THE

RULES OF EVIDENCE

Stated and Discussed.

BY

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PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS AND PUBLISHERS,
No. 535 CHESTNUT STREET.
1860.

PILE & M'ELROY, PR'S,
LODGE STREET.

PREFACE.

MANY years ago I read with great interest the masterly work of Bentham on the subject of Evidence. But as that is not readily accessible, and is so voluminous, it occurred to me, that a careful examination of the more important rules of law, as to the admission and exclusion of evidence, and the differing modes adopted in its extraction, as settled by courts of law and equity, would not be without interest to the legal profession and would be of utility to the public. Accordingly, I prepared numerous articles for literary and legal journals, discussing different portions of this subject. These I have collected, and with occasional corrections and additions I now offer to the public. I should have been glad to have avoided the repetition of the same line of argument when examining the different rules of exclusion; but this I could not remedy, without re-writing the whole work, for which I have not sufficient leisure.

The conclusions to which I have arrived are these:

All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.

Objections may be made to the credit, but never to the competency of witnesses.

While the best evidence should always be required, the best existing and attainable evidence should not be excluded, because it is not "the best evidence of which the case in its nature is susceptible."

The best mode of extracting testimony, orally, in public, and before the tribunal which is to decide upon the facts in dispute, should be adopted on all occasions, and before all courts, when practicable. The only exception to the universality of this rule is one arising from special delay, vexation and expense in its observance; as, in case of sickness, or the absence of witnesses.

Many of the errors in the law, here pointed out, have been cor-

rected. Many of the reforms, here suggested, have been partially adopted. Interest and infamy in very many of the States have ceased to be grounds for the exclusion of testimony. A limited admission of the testimony of the husband and wife, has been allowed in cases in which one or the other is a party.(*a*) The parties in civil cases with greater or lesser restrictions upon their testimony have been received or compelled to testify in their own cases. In offences of the lowest grade of criminality the accused in one State(*b*) has been admitted as a witness in his own behalf. But incompetency from defect, or a want of religious belief, is still the law in most of the States. The communications between client and attorney remain privileged. The law as to confessions and hearsay continues in a condition pre-eminently chaotic. Different courts, and the same court on different occasions, employ differing modes of extracting proof. Much, therefore, remains to be done.

So far as changes have been made, their practical working in the administration of the law has been such as to make it a matter of astonishment, how courts could have ever hoped to administer justice when the evidence now received was excluded.

The importance of the subject is commensurate with the importance of justice itself. Without evidence, or with bad rules, the judge of fact is as powerless to do justice, as the Hebrew of old was to make brick without the needed straw. In what I have done, I have only endeavored to apply the reasoning and principles of Bentham, of which I have made free use, to the law as found in the treatises of jurisconsults and the decisions of courts; and if I shall have aided in accomplishing the changes, which I regard as necessary and indispensable, I shall be abundantly rewarded for my labors.

BANGOR, 3d April, 1860.

(*a*) "In the trial of all civil suits, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife." St. of Maine, 1859, c. 102, sec. 1.

(*b*) "No respondent in a criminal prosecution or proceeding at law, for libel, nuisance, simple assault, simple assault and battery, or for the violation of any municipal or police ordinance, *offering himself as a witness*, shall be excluded from testifying, and all laws inconsistent herewith are hereby repealed." St. of Maine, 1859, c. 104.

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THE

RULES OF EVIDENCE.

CHAPTER I.

EXAMINATION OF THE ARGUMENTS IN FAVOR OF EXCLUDING WITNESSES FOR ANY CAUSE.

In the whole field of law or of legislation, there is no subject of such vast practical importance as the rules by which the admission or rejection of evidence is determined. The substantive portion of the law, that which prescribes or ordains, may be in the highest degree wise; the criminal code may be framed with the soundest philosophy, and the most judicious combination of the principles of prevention and reformation; perfection, in fine, may be predicated of each and every portion of the substantive branch of the law, yet if the rules of evidence are erroneous, the wisdom of the law is no better than so much folly, the will of the legislator is unheeded, his rewards unreapt, his penalties unimposed.

Important as is the subject, and its importance corresponds to that of all interests, which may be judicially endangered, yet it is but recently, that it has received the attention of the public either in Europe or in this country. In the year books and the earliest reports and digests, questions relating to the competency of witnesses or the admissibility of evidence, were of the rarest occurrence. The intricate technicalities, the hair-breadth distinctions, the conflicting and contradictory decisions, which form so large a portion of any treatise on evidence, are not to be found in the Rolles and Fletas of our early jurisprudence. By the gradual accretion of decisions, this has now become one of the most important divisions of the law, so that he, who is thoroughly versed in its rules may be considered, without other professional learning, as almost prepared for the practice of the courts.

Of the rules of evidence as established by the common law, it may be said, without the slightest exaggeration, that if the knaves and criminals great and small, had united upon a code the object of which should be to afford the greatest security to each, consistent with the existence of law; had they taken "sweet counsel together," with full power to establish rules of evidence, which should afford the minimum of protection to

society, and the maximum of impunity to themselves, with yet a remote possibility of punishment, it is difficult to perceive how, having any rules, they could have materially improved upon the existent law. Aware that some rules must be granted to pacify the demands of society, the sagacious knave and the discreet criminal would hardly have pressed for the adoption of rules more favorable to the legal impunity of crime and the successful consummation of fraud, than those which the common law, in its sympathetic wisdom, has so kindly furnished to their hands. It has closed the most obvious and readily accessible means of information. It has excluded those, who from interest in or relation to a cause would have the best personal—and those, who from connection with the party as husband, wife or attorney, would have the best derivative means of knowledge. The individual defrauded is refused a hearing; the party defrauding is not compelled to answer. The criminal rejoices in his own exemption from the dangers of cross-examination, and in that of all those of his fellows whom conviction may have stamped with ignominy.

That judicial action requires or should require, for its basis, proof,—that this should be sought for from all available sources; that existing, no matter where, it should be rendered forthcoming for the purposes of justice, would seem to be propositions so self-evident as to require neither argument nor illustration. That the sources from which evidence would be sought, should vary in relative trustworthiness, was to be expected,—for witnesses in a cause cannot be selected in advance. When the burglar will enter the dwelling; when the assassin will stab; when the knave will defraud; when the dishonest will deny or evade the obligations of his contract, can be neither foreseen nor foreknown; for if foreseen or foreknown, the entry of the burglar, the stab of the assassin, the frauds of the knave, would have been guarded against and prevented; the violated contract would never have been entered into. Proof therefore must necessarily be had from sources corresponding to the act proved, and from the parties to the act—from the parties to the crime to be investigated,—and the contract to be enforced; from their accomplices and associates, their friends and relatives. Primarily, without recourse to reasoning or investigation, it must be seen that from such sources, more directly and obviously than from any other, evidence more or less reliable can always be had; that these are the natural sources from which to seek for proof. All other evidence must ordinarily be casual, fortuitous, the result of accident, not of forethought. Fortuitous, accidental, unexpected, it will obviously have all the general characteristics of humanity, embracing convicts and atheists, the bad and the good; those interested and those indifferent; all who may have had knowledge of the fact to be determined. The party injured having foreseen no wrong, having no pre-appointed witness, must be allowed to offer whatever exists; his own testimony, for of that alone he is certain; that of his opponents, compulsorily if needed; that of all those who may have knowledge of the subject in dispute, no matter what in point of character or in degree of interest they may be, he himself suffering, if the testimony, from any cause, is liable to suspicion, in the diminished credence it will receive, or else he must be remediless and endure in silence the wrong which has

been committed. The exclusion of proof entitled to any weight—the slightest,—is the voluntary self-deprivation, by the court thus excluding, of the means of correct decision, to the extent of all proof for such cause excluded. If the testimony rejected be the only proof attainable, it is an utter denial of justice. It is like bandaging the eye to aid vision; like imposing manacles and fetters to accelerate motion.

Of the lengthened series of circumstantial facts by which right is sought to be established and crime developed, it is not to be expected that each fact in the series should be proved by the same kind of evidence or by witnesses, whose testimony shall in each instance have the same degree of probative force. No rule can be established in advance, by which the degree of credit to which a witness is entitled can be predetermined. The same law of nature, by which the strength, the complexion, the size, is seen to vary, will equally exist in reference to clearness of perception, strength of recollection and integrity of narration. Whether the intellect of the witness is keen, his memory good, his integrity unimpeachable, can only be known after, and consequent upon examination. Common sense requires a hearing in each particular case, before deciding upon the greater or less degree of credence to which the witness may be entitled. Of individuals or of classes there is none of which falsehood can certainly be predicated in any particular instance. Exclusion because of anticipated falsehood, is decision without and before hearing,—decision adverse to the integrity of the witness. The law in one phase of its action, when the criminal is on trial, presumes his innocence; when a witness is to be called, in all its exclusions the presumption is guilt, to prevent which the witness is excluded; guilt on the part of the witness; on its own part incompetency utter and irremediable, else there would be neither fear nor danger in receiving proof, against the truth of which the court seems to be so fully and entirely on its guard.

It is obvious that the integrity and trustworthiness of witnesses will be exposed to various and conflicting motives; the action of which will vary at the same time upon different persons, and upon the same person at different times and under different conditions. However difficult it may be after the full benefit of examination and cross-examination, and after a careful comparison of the testimony of one witness with another, to award to each the precise degree of credence which his testimony may merit, it is still more difficult to decide this question, without such hearing and comparison. Caution, necessary in all cases, may be more particularly required, therefore, where there is danger of undeserved credence; and in such case the legislature may well place the judge of fact on his guard. But caution and exclusion are entirely different. Caution places the judge on his guard against sinister bias, gives him all the possible material for correct decision, but requires prudence and judgment in the use of the materials furnished. If the evidence excluded be true, no possible reason can be given for its exclusion. Whether true or not cannot be foreknown. Judicial assumption can hardly claim infallibility, yet excluding such is the assumption of the judge. Misdecision, the excluded evidence being material, true and unattainable

from any other source, is seen to be inevitable. If the evidence be not true, that misdecision would ensue from its reception, is by no means certain. If false, its very falsity made manifest from other sources, would be an article of circumstantial evidence of no ordinary force in inducing correct decision. Presumed imbecility on the part of the judge of fact; presumed guilt, or rather guilt presumed on the part of the witness, if an opportunity to testify should occur; such the reasons for exclusion. How can the law foreknow that judges whose capacity is unknown, will be deceived by the testimony of unknown witnesses, of whose integrity they are equally in the dark. But exclusion pre-supposes a judgment of which such exclusion is the consequence,—a judgment without knowledge or the means of knowledge,—which determines the future perjury of all witnesses of the excluded classes as preponderantly probable, and the future imbecility of all judges to justly decide on the testimony of such witnesses.

While it is thus clear, then, that no exclusions should be made, because no judge nor legislature, centuries in advance, can foreknow or persumably conjecture, what in each case shall be the importance, necessity, truth or falsehood of any unknown witness, nor the competency of a judge hereafter to be born correctly to weigh such testimony; nor what would be the consequence from the admission of the excluded testimony, whether favorable or unfavorable to justice, still the common law excludes great masses of testimony, and particularly the testimony of those from whom especially the knowledge of facts might be obtained,—of those who at all events must know, whether they will truly or not disclose that knowledge.

It should ever be borne in mind that litigation is rarely foreseen; that it springs up unexpectedly; that no one can foreknow and prepare in advance for the emergency. No one goes around in the ordinary business of life attended by a witness, like a familiar spirit, who may be always ready to see and hear what may occur; nor if any one were sometimes thus accompanied, could he be sure of his presence when the occasion in which he might be needed, should arise.

There is no act the most trivial, no contract the most insignificant, which may not become the subject of litigation, or upon which the most important consequences may not depend; as the hour of rising, of departure from or returning to one's residence, the articles of apparel worn, the road taken, the place of stopping, the individual with whom conversation may have been held, the topics of such conversation, the precise questions put and answers given, all, any, every thing which man has done or which man can do. The infinite variety of human action is only co-extensive with the infinite variety of litigation, upon which property, liberty or life may depend. There is no event, no word spoken, no act done, no motion of the body, no thought of the mind, which in the eternal chain of antecedents and consequents, may not become matter of inquiry. In vain, then, can one in advance guard and protect his rights. He cannot know how nor when they will be put in jeopardy, or if so, by what witnesses the facts he may deem of importance, may be proved. Whether they be men of deficient or exuberant faith; whether they be men famous

for integrity or infamous for want of it; whosoever they may be by whom such facts were perceived, he needs them, and if they be the only witnesses, still greater is his need.

The exclusion of testimony from whatsoever source attainable is presumably wrong. The judge needs testimony else he cannot decide; he requires proof, else he is without the means of correct decision. He might as well resort to the lot, to ordeals by fire, to ordeals by water, to burning ploughshares, to trials by battle, as attempt to decide without proof. So obvious would all this seem, that one would suppose that resort would naturally be had to those by whom the facts were known. To the common lawyer it seemed otherwise. Ordinary men seeking for information inquire of those who know. Extraordinary men, learned men, lawyers deeply imbued with the wisdom of the past, especially object to inquiring of such.

Exclude evidence material and unattainable from any other source, for what cause soever, plausible or otherwise; exclude evidence, and the judge, to the extent of, and in proportion to the importance of the evidence excluded, is deprived of the means of correct decision. Exclude all evidence for any reasons, or for such reasons as have in various instances been assigned, and the judge is compelled to resort either to lot or to arbitrary will, not by any means so safe as the lot for the determination of the cause. He is deprived of the very food of justice, *pabulum justitiæ*, as Bacon terms it. Justice was beautifully symbolled by the ancient Greeks as blind. Deaf as well as blind she might as well be, if she is to be precluded from hearing testimony. Correct decision, the great result sought for, mainly depends upon the fullness of the facts presented for consideration. Any source, every source, any individual, every individual, no matter who he may be, to whom any portion, however minute, of the facts may be known, should be heard. Scrutinize his testimony as severely as you will, but hear it. Because the light of the noonday cannot be had at midnight, should the farthing taper therefore be extinguished? Because from the best conceivable sources proof cannot be obtained shall none be had?

He who would exclude material evidence obtainable from any source whatsoever, is bound to give satisfactory reasons for such exclusion. A learned writer(*a*) on the subject of evidence bases the general doctrines of exclusion upon the following grounds:—

"Although in the ordinary affairs of life *temptations* to practise deceit and falsehood may be comparatively *few*, and therefore men may ordinarily be disposed to believe the statements of each other; yet in judicial investigations, the motives to pervert the truth and to perpetrate falsehood and fraud are *so greatly multiplied*, that if statements were received with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. In private life, too, men can *inquire and determine for themselves* whom they will deal with, and in whom they will confide; but the situation of judges and jurors renders it difficult, if not impossible in the narrow compass of a

(*a*) Greenl. on Evidence, § 326.

trial, to investigate the *character of witnesses;* and from the very nature of judicial proceedings and the necessity of preventing the multiplication of issues to be tried, it may often happen that the testimony of a witness unworthy of credit may receive as much consideration as that of one worthy of the fullest confidence. If no means were employed *totally* to exclude any contaminating influence from the fountains of justice, this evil would continually occur. But the danger has always been felt and always guarded against in all civilized countries. And while all evidence is open to the objection of the adverse party before it is admitted, it has been *found necessary to the ends of justice* that some kinds of evidence should *uniformly* be excluded.

"In determining what evidence shall be admitted and weighed by the jury, and what shall not be received at all, or in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied similar to that which distinguishes between conclusive and disputable presumptions of law, namely: the *experienced connection* between the *situation* of the witness and the *truth or falsity* of his testimony. Thus the law excludes, as incompetent, those persons whose evidence in general is found more likely than otherwise to mislead juries; receiving and weighing the testimony of others, and giving to it that degree of credit it is found on examination to deserve. It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty as will ordinarily meet the justice of the case. The question is not whether any rule of exclusion may not sometimes shut out credible testimony, but whether it is expedient that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded. And in this case, as in determining the ages of discretion and of majority, and in deciding the liability of the wife for crimes committed in company with the husband, and in numerous other instances, the common law has merely followed the *common experience* of mankind."

Such are the general reasons by which the exclusion of testimony is justified. They are fairly stated. They are all the law has to give. Are they well founded? They require and should receive a careful and deliberate examination.

The main business of life is in hearing and reasoning on evidence. Judicial action—decision upon proof—is an every day affair of common life. Evidence, proof, testimony is the same, whatever may be the occasion on which it is obtained, or the uses to which it is applied; whether it be given "in the ordinary affairs, or in judicial investigations," its probative force is the same. The individual—party, wife, attorney, convict, atheist,—no matter what he may be,—whose statements out of court would be entitled to, and would receive credence, (and "in the ordinary affairs of life" they might receive credence, though it were a party speaking of his own interests, a wife of her husband's, an attorney of his client's, a convict or an atheist, of those of others,) would be none

the less entitled to belief, because the same statements in relation to the same subject-matter should be uttered in open court. "The ordinary affairs of life," all business transactions between men, are conducted upon evidence, and the same principles which guide, the same rules of judging and weighing testimony, are alike applicable in "judicial investigations" as "in the ordinary affairs of life." Not a day, not an hour passes, in which every man is not called upon to act upon proof without the checks, safeguards, and securities of judicially delivered testimony. The ratio of the value of property, or interests upon, and in relation to which judicial action is, to that in which it is not required, shows the relative values thus respectively determined upon, and their difference, and that but a very trivial and comparatively minute portion of the great business of life ever receives or requires judicial consideration. "In the ordinary business of life," were a man to be governed by the rules of the law, as to the sources from which alone it would be safe to receive information, he would be thought better fitted for a place in a lunatic asylum, than for the management of his own affairs. Two children disputing, of whom does the father inquire? Wishing to know the truth, does he send his children away, and proceed to glean confessional fragments of what his children may have said from the servants in the kitchen? Was there ever found a lawyer or judge so idiotic as to be governed out of court by the rules which are followed in court in the investigation of facts, and are lauded as the perfection of human reason. But if in the infinite variety of human affairs, different rules from those which govern the courts are acted upon, and seen to be acted upon without prejudice or injury, does it not afford a strong indication that such rules might be adopted in the trial of causes, without endangering the rights of property or the peace of society?

"In the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few." Temptations few! Why they are as numerous as the objects of human desires, as potent as the hopes and fears, the losses and gains of life. "In judicial investigations, the motives to pervert the truth and perpetrate falsehood and fraud are so greatly multiplied." How multiplied? How little of what man has or desires is ever the subject of judicial investigation? How rare is litigation to each man. How little of the wealth of the rich or the pittance of the poor, in comparison with the aggregate possessions of either, is ever the subject-matter of a judicial contest; and if it were, how is the motive to "*falsehood and fraud*" thereby increased? The same object is no more an object of desire, because its attainment is to be sought through the intervention of judicial action, than if sought without such intervention; nor will there be more likely to be falsehood in one case than in the other. Multiplication of occasions for falsehood there is not, still less is there of motives. Falsehood in ordinary affairs receives, when detected, only the punishment of public opinion. Judicially uttered, falsehood is not merely followed with loss of public respect, but is or may be followed by the severest penalties of the law. The ordinary motives to truth exist in their accustomed vigor; and to these is, or may be, superadded the disgrace of convicted perjury. The motives inducing

falsehood are no greater because the amount involved is sought to be judicially obtained. Whatever the amount in question, one dollar or one million, the interest is no greater in court than "in the ordinary affairs of life," when the same amount is at stake; the motives to preserve or retain are the same, while new motives, whose tendency is to preserve the witness in the line of truth, are called into action. So that, whatever may be the subject-matter—property, character, what not—the fact of its being judicially investigated furnishes no additional motives for falsehood, but, on the contrary, many and important securities for truth, not attainable in private life. The fear of punishment, examination and cross-examination, the checks of adverse testimony, lessen the dangers and diminish the probabilities of false testimony.

"In private life, too, men can inquire and determine for themselves whom they will deal with, and in whom they will confide; but the situation of judges and jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses." What then? The argument, if good for anything, would imply that judges were to investigate for themselves, and because they are not able to investigate satisfactorily the character of witnesses, that therefore all witnesses should be excluded. But is this investigation ever pursued by judges or jurors as to those who are received? If not, what is the force of the argument in favor of exclusion? Suppose it ever so difficult to ascertain the character of witnesses. What then? Is it their business? Is it the duty of the judge to descend from the bench, the juror to leave his panel, to investigate the character of witnesses? And are witnesses, by classes, to be shut out because this cannot be done? It is not done as to those received. Is it not equally necessary that it should be done in the one case as in the other?—as to those received, as to those excluded? But what is the danger of deception on the part of the judge or jury? The party active, vigilant, with time and means, will be little likely to permit his rights to suffer from not sufficiently scrutinizing the character of those who may be witnesses against him.

It is said, "it may often happen that the testimony of a witness unworthy of credit may receive as much consideration as that of one worthy of the fullest confidence;" but does any argument in favor of shutting out evidence arise from that fact? Of what witness may it not be said that the judge or jury may have erred in giving too much or too little consideration to his testimony? If of none, then to what possible case does not the same argument apply? What witness should ever be received? Is then exclusion the legitimate inference, or is it that there should be increased vigilance on the part of the judge or the jury?

"If no means were employed totally to exclude any contaminating influences from the fountain of justice, this evil would constantly occur." But is all contaminating influence excluded? Can it be? Who knows or can know in advance that the evidence excluded will be contaminating? But what is the evil, the constant occurrence of which is sought to be guarded against? That of inability on the part of judges or jurors to investigate the character of witnesses? That is never done. The judge who should attempt it would be impeached, and the juror who should go

about investigating for himself, would probably be discharged before he had proceeded very extensively in his inquiries. Is the evil that of believing witnesses unworthy of credit? And is that to be guarded against by excluding all contaminating influences? How can that be done: how know in advance the full effect of conservative influences, and the sinister bias from those which may be contaminating, upon unknown witnesses? And how can it be ascertained on which side will be the balance, for on that the decision of the question depends.

"In determining what evidence shall be admitted and weighed by the jury and what shall not be received at all," the law is said to be founded upon "*the experienced connection* between the *situation* of the witness and the *truth* of his testimony. Thus the law excludes as incompetent those persons whose evidence in general is *found* more likely than otherwise to mislead juries." The rule then is based on experience of the evils resulting from an admission at some former time of the now excluded testimony. But this "experienced connection" is a matter of fact, itself to be proved by testimony—not by reasoning. One would be puzzled to define that period of the common law, when parties or those interested were received as witnesses, or to show when and why the change occurred by which they were excluded. The experiment—when and where did it take place; under what king's reign? In which of the year-books or in the later records of judicial wisdom are "found" those experimental cases, where those now incompetent were sworn, to the great subversion of justice, and results so disastrous ensued therefrom that legislative sagacity interposed? In which of the parliamentary rolls is found the statute making so great and necessary changes? Experienced connection! Why so far as there has been any experience, it has been of exceptions to general rules, which were so bad, that it was found necessary for the purposes of justice in innumerable instances to violate them.

The true question is, whether it is expedient that there should be any rule of exclusion at all. That question is nowhere met. The argument of Mr. Greenleaf, in his work on Evidence, does not meet it. So far as the "experienced connection" is to be considered as a fact, it never existed. He says "the common law has merely followed common experience." If by common experience is meant the experience of other nations, it is obvious that unless their exclusions are the *same*, and unless, further than that, they have been the result of some "experienced connection" between the admission of the now excluded evidence, and falsehood, they furnish no argument in favor of exclusion, and if so based, they furnish an argument only in the particular instances in which the experience has been had.

What are the teachings of experience as found in the code of other nations? The Jews, with little of the spirit of modern gallantry either in the rule or the reason therefor assigned, excluded all women on account of "the levity and boldness of the sex." They likewise rejected the testimony of children under thirteen years of age, of the deaf, dumb, blind, insane, the relations and enemies of parties, publicans, slaves, robbers, those convicted of having borne false witness, and those

who had committed any crime worthy of death. The Mahometans, in all matters of property, require two men, or one man and two women, to prove any fact, estimating the testimony of a woman at half that of a man in trustworthiness. By their laws the moral character of witnesses was regarded; drunkards, gamesters and usurers being incompetent. Evidence of a son or grandson in favor of his father or grandfather was not received, and the reverse. Slaves could not testify for their masters nor their masters for slaves: nor could infidels and apostates be heard where a Mussulman was a party.

The institutes of Menu, which for ages were the law of the multitudinous population of India, present a curious illustration of the caution with which evidence was received. "Those must not be received as witnesses who have a pecuniary interest; nor familiar friends, nor menial servants, nor enemies, nor men perjured, nor men grievous by disease, nor those who have committed an heinous offence. The king cannot be a witness, nor cooks, nor other mean artificers, nor public dancers and singers, nor men of deep learning in scriptures, nor a student in theology, nor an anchorite, nor one dependent, nor one of bad fame, nor one who follows a cruel occupation, nor one who acts against law, nor a decrepit old man, nor a child, nor *one* man unless distinguished for virtue, nor a wretch of the lowest mixed class, nor one who has lost the organs of sense, nor one grieved, nor a madman, nor one tormented with hunger or thirst, or oppressed with fatigue, excited by lust, inflamed with wrath, nor one convicted of theft."(*b*) A slave of either sex, a blind man, a woman, a minor till the age of fifteen years, an old man of eighty years, a leper, and the like, were not received as witnesses.

These, it may be said, are the exclusions of ignorant barbarians. If we examine the Roman law, as found in the responses of her civilians or the edicts of her prætors, or the rescripts of her emperors,—the Roman law, as illustrated by the learning and genius of the Catos and Scævolas of consular, or the Tribonians and Ulpians of imperial Rome—though we may find absurdities less glaring than those of the great lawgiver of the East, it will still be seen that Rome made in this branch of the law but slight advances towards sound views either as to the admission or the just appreciation of testimony. In the civil law, the exclusions are almost as numerous and not much more judicious than those found in the laws of Menu. By its provisions, children approaching puberty were to be received, but not compelled to testify of matters within their understanding. Minors were received as witnesses when pecuniary interests were at stake, but they were not allowed in criminal cases, unless over twenty years of age. Slaves were not witnesses if the facts could be obtained from any other quarter. The testimony of those convicted of offences against the state, informers, those cast into the public prisons, those guilty of making false accusations, those expelled from the senate, apostates, heretics, libellers, those convicted of bribery, infamous women, those who hire themselves to fight with wild beasts, the worthless and the poor, were not admitted when other proof could be

(*b*) Laws of Menu, c. 8, §§ 64, 65, 66, 67.

had. The son could not be admitted for the father, nor the father for the son. Patrons were not heard in the cause of their client, guardians of their ward, nor overseers in that of the minor, of whose estate they had charge.(c)

By the common law, parties to a suit, those interested in its result, husband and wife, the attorney as to all confidential communications from his client, the atheist and the convict, are excluded as witnesses.

The general arguments to which we have adverted, would as well support one set of exclusions as another: and whether found in the Hedaya or the Pandects, in the institutes of Menu or in those of the common law, they would be alike and equally applicable; for being based upon assuming the very question to be proved, one lawgiver may as well make the assumptions required to support his case as another. Were all these exclusions to be united in one system of law, it is difficult to imagine from what source proof could ever be obtained. Their discordant variety furnishes no slight argument against all.

When trial by battle was the law of the land and the rights of person and property, the guilt or innocence of the accused was made to depend upon the skill and vigor with which the weapons of the combatants were wielded; when the wisdom of the Almighty, it was expected, would intervene to the vanquishing of the oppressor and the defeat of the wrongdoer, this mode of determining guilt or innocence had its strenuous supporters, as rules hardly a whit wiser now-a-days have theirs. Were this mode of trial the law of the land and the practice of the courts, sage counsellors, experienced judges learned in the law, would be found opposing an alteration, as endangering the best interests of society. The wisdom of our ancestors, the terrors of innovation, the timid forebodings of endangered conservatism, would bear sway, and the clangor of arms, and the streaming of blood, and the death wounds of the defeated combatants, would even now be seen and heard, and the results of the combat be received as proof conclusive of the right. Indeed, the same arguments then urged for the continuance of this mode of trial, are what judges and chancellors now deem sufficient to justify the exclusionary rules of the common law and of equity. Venerable conservatives, like our judges, haunted by fears of perjurious testimony, faithless in the integrity of witnesses, defended the judicial combat, fearing that without it every heir would be disinherited, as it would be easy to find two persons, who would perjure themselves if they had no fear of being challenged; "for it would be better to leave to God, to whom all things are open, to give the verdict, in such case, *scilicet*, by attributing the victory or the vanquishment to one party or the other, as best pleaseth him, than to put it to the country, that is, to the jury, who, for default of evidence, may be ignorant of right." So now it is deemed wiser to decide without evidence to the extent of the evidence excluded—and it may be of all attainable proof—than to trust the jury who might decide erroneously. Fear of perjury is alike the reason of the defender of the trial by battle and of trial without proof,

(c) Heinnecius *Elementa Juris Civilis*, Tit. V. de Testibus, &c.

to the extent of all exclusions, for they both proceed upon the same principle,—the facility with which perjury is committed and the utter inability of the judge of fact to detect its commission.(*d*) The judge of the olden time, fearing perjury, but trusting in God, sent the litigants to battle, and determined their rights "according to the victory or the vanquishment" of the one or the other; the modern judge with similar fears but with less trust, relying neither on himself nor on God, deprives those who are to decide of the means of correct decision, and leaves the result, as far as relates to himself, to accident.

(*d*) The compiler of the assizes dé Jérusalem "thinks it would be very injurious, if no wager of battle were to be allowed against witnesses in cases affecting succession; since otherwise every right heir might be disinherited, as it would be easy to find two persons who would perjure themselves for money if they had no fear of being challenged for their testimony. *This passage indicates the real causes of preserving the judicial combat; systematic perjury in witnesses, and want of legal discrimination in judges.*"—Hallam's Middle Ages, Part 2.

Presumed perjury in witnesses and presumed imbecility in judges of fact, lie at the foundation of all the exclusionary rules of modern times.

"Je pencherais à croire que tout homme, quel qu'il soit, peut être reçu à témoigner. L'imbecillité, la parente, la domesticité, l'infamie même n'empêchent pas qu'on ait pu bien voir et bien entendre. C'est aux juges à peser la valeur du témoignage et des reproches qu'on doit lui opposer."—Prix de la Justice. Oeuvres de Voltaire, 34 Tome, 418.

The more barbarous a nation, the more numerous are its exclusions of testimony.

"The Siamese are extremely capricious in the standard value of witnesses; the oaths of *priests and men in office* bearing a preference over all others, while there are not less than twenty-eight in number, who are excluded and declared to be incompetent; they are as follows: contemners of religion, *persons in debt*, the slaves of a party to a suit, intimate friends, idiots, those who do not hold in abhorrence the cardinal sins, among which are enumerated besides theft and murder, *drinking spirits*, breaking the prescribed fasts and reposing on the mat or couch of a priest or parent, gamblers, vagrants, executioners, *quack doctors*, play actors, hermaphrodites, strolling musicians, prostitutes, blacksmiths, persons laboring under incurable diseases, persons under seven and above seventy, *bachelors*, insane persons, persons of violent passions, shoemakers, beggars, braziers, midwives and sorcerers." Roberts' Embassy to Siam, 306, 307.

CHAPTER II.

OF INCOMPETENCY FROM DEFECT OF RELIGIOUS PRINCIPLE.

In examining the rules of evidence, the *substantive* part of the law, that portion which directs and ordains, which creates rights and obligations, either civil or criminal, and prescribes the punishment for the violation of those rights and obligations, must for all the purposes of the discussion be considered perfect; and every rule of evidence must be regarded good or bad as it increases or diminishes the efficiency of this branch of the law. As the law operates only through the medium of evidence, to ascertain the fact or facts which require its aid, evidence is necessary. "Evidence, then, is the basis of justice, and the exclusion of evidence is the exclusion of justice." As it may be obtained from all, it should be sought from all, the good and the bad, the willing and the unwilling. Every individual whose fortune it may be to be a percipient witness of a disputed fact, whether atheist or believer, interested or disinterested, husband or wife, attorney or client, the convicted felon and the prisoner at the bar, should be examined and heard as witnesses, unless in any given case, greater mischief would be likely to result from the admission than the exclusion of their testimony; for wherever any parcel of evidence is excluded, the judges of fact (by whatsoever name called) are, to the extent of the exclusion, deprived of available and requisite means of information.

By the existing rules of evidence, both of the common and civil law, vast and important masses of testimony are excluded; that is, prevented from being heard by the respective judges of fact, before whom causes may be tried. No valid reason can be given for these exclusions, other than that the admission of the excluded testimony would be attended with a preponderance of evil exceeding that arising from its rejection. As the cases in which testimony is excluded are numerous, and have for their bases different and discordant reasons, we propose to examine separately the force and validity of the reasons assigned in each case for exclusion.

Exclusion, or as it is technically termed, *incompetency*, from defect of religious principle, will form the subject of the present chapter. When the common law flourished in its pristine vigor, it was laid down generally, that "an infidel could not be a witness, in which denomination Jews as well as heathen, were comprised; and Hawkins thought it a sufficient objection to the competency of a witness, that he believed neither the Old nor the New Testament." The original rule was found fraught

with evil, and at length (in Omichund v. Baker)(a) received a partial judicial repeal. But still in England as well as in this country, "those are not competent witnesses who do not believe in the existence of a God or a future state, or who have no religious belief."(b)

The authorities, however, are by no means concordant as to the precise amount of belief sufficing for admission or requiring rejection. "As to the nature and *degree* of religious faith required in a witness, the rule of law as at present understood, seems to be this, that the person is competent to testify, if he believes in the being of God, and a future state of rewards and punishments; that is, that *Divine punishment*, will be the certain consequence of perjury. * * It is not material, whether the witness believes that the punishment will be inflicted in this world or in the next."(c) But the witness must believe that a *supernatural* punishment will be inflicted here or hereafter, "for it is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury."

As there is an infinite variety of character among men, so among witnesses, the degree of credit to be given to their statements, varies from full and implicit confidence to entire and unhesitating disbelief. Whatever may be urged against any witness, as affecting character, should be urged against his credit, and not his competency. In examining the question of exclusion, on the score of religious belief, the case of the atheist alone will be considered, for if atheism should not be deemed a sufficient reason for exclusion, no other variety of religious opinion ever can be.

The testimony of a witness is required, because he has seen, heard or known something relating to the issue between the parties litigant, which being truly related would materially affect their rights. Now neither the eye nor the ear, nor the touch,—neither the vision nor the hearing, nor the perception is affected by the more or less erroneous belief or unbelief of the person seeing, hearing, or perceiving. The important in-

(a) Willes, 545.

(b) "Pour qu'un individu soit habile et acceptable à témoigner, il faut, * * * qu'il ne soit pas excentrique dans ses croyances (soit par ignorance, soit par système ou de propos délibéré), fût ce même par suite de raisonnements et par esprit philosophique; it ne doit pas être, par example, un *khâridgî* ou un *kadari*, c'est à dire un sectaire ou un partisan de la doctrine de la non-prédestination ou fatalité des actes; cette doctrine implique l'ignorance des rapports des causes aux effects; les doctrines des sectaires ou schismatiques impliquent la tendance à expliquer les choses par les discussions," &c.—Jurisprudence Mussulmane, Tome V. 193.

(c) 1 Greenl. Ev. § 368, 369. In Atwood v. Walton, 7 Conn. 66, Mr. Justice Daggett says, that if "it is satisfactorily proved that the person does *not* believe in a *future* state of rewards and punishments, there is not that tie upon his conscience and of course that sanction, which the law requires; and therefore, he ought not to be sworn."

In the People v. Mattison, 2 Cow. 433, Walworth, J., says, "if he believes there will be punishment by his God *even in this world* if he swear falsely, there is a binding tie upon the conscience, and he must be sworn."

In Hanscom v. Hanscom, 15 Mass. 184, the Court considered a disbelief in a *future* state of existence as an objection to the credibility and not the competency of the witness.

quiry is whether he will truly relate what is seen, heard, or perceived, *for if he will,* his testimony is equally necessary and desirable for the purposes of justice, as if his belief were of the most unimpeachable orthodoxy.

The exclusion in the case under consideration rests upon the assumption of the question in dispute. The witness is excluded because(*d*) he "*is unworthy of any credit in a court of justice.*" Utter mendacity—falsehood without and against motive, is regarded as a necessary and conclusive presumption from want of faith or erroneous faith. But error in belief is compatible with truth of statement. Because a man's faith may be erroneous, it does not necessarily nor even probably follow that his testimony will be perjured.(*e*)

Improbity, such as would affect testimony, inferred from want of faith, from erroneous belief, is the only reason of any force that can be given for the exclusion of the atheist. But atheism is not improbity, it is only an erroneous conclusion from misjudgment or want of sufficient consideration, and the most that can be said of it is, that it diminishes the restraints upon crime and lessens the incentives to virtue. The atheist testifies under the influence of the same restraining motives as other witnesses, save the fear of *supernatural* punishment here or hereafter. There is the absence of only *one* of the mendacity-restraining motives. The atheist *can* speak the truth. Unless then greater evils result from his admission than his exclusion he should be heard. In the great proportion of cases where he would be without interest in the result, he would be without motive to commit perjury. No man will do it without some object is thereby to be gained. The same motive in all cases tempts to or prevents the commission of crime,—a benefit real or imaginary,—a supposed *utility* to the criminal. The atheist and the believer, when they are devoid of any sinister interest, are equally entitled to credit, for neither, without and against motive, will commit crime.

In all cases where there might be an interest leading in a sinister direction, whether legal or not, the atheist would be less entitled to credence, because one restraining motive is wanting. So far as any motive derived from the good or evil of this world—fear of punishment or the loss of reputation—would influence conduct, their credibility would be equal. The difference of credit therefore, would depend on the fear of divine punishment here or hereafter as a motive influencing conduct and de-

(*d*) In Norton v. Ladd, 4 N. H. 444, the court say, "He who openly and deliberately avows that he has no belief in the existence of a God, *furnishes clear and satisfactory evidence* against himself, that he is incapable of being bound by any religious tie to speak the truth, and is unworthy of *any* credit in a court of justice."

"When the point shall arrive," says Mr. Alison, in his Practice of Scotch Criminal Law, 438, "it is well worthy of consideration, whether there is any *rational* ground for such an exception, . . . whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession."

But it seems in Scotland, that witnesses to be competent are required "to believe in a God and a future state of retribution, in which falsehood will be punished." Tait on Evidence, 347.

(*e*) *Dat fidem vir jurijurando non jusjurandum viro.*

terring from the commission of crime. There are certain securities against crime, such as character, if good, education, fear of present and future punishment. The strength of these securities is as variable as the character of the individuals subject to their influence. So too, there are concurring causes, such as interest, passion, hatred, revenge, &c., which lead or may lead to falsehood; and it is only by comparing the relative force of the various antagonist motives which influence an individual, that we can approximate to a correct opinion as to the probable truth or falsehood of his testimony. Men are not of uniform weight and measure, nor of passions and feelings of equal duration and intensity. Neither do the results, so far as concerns the truth or falsehood of testimony, depend on the number of the mendacity-restraining, or the mendacity-promoting motives, but rather on the energy with which they act. One motive may be sufficient in a given situation to restrain one, while the union of many would be found insufficient to produce the same effect in another individual. The dread of temporal punishment to a man sensitive of reputation, might have more influence upon his conduct than the dread of present and *future* punishment would on a mind differently constituted. The absence of *one* mendacity-restraining motive proves not the absence of *all*. It merely proves that no reliance can be placed on the *one* wanting. When the motives to perjury exceed the inducements to truth and the checks to crime, then the witness, whoever he may be, and whatever his belief, will testify falsely. In every case of conflicting testimony, it is a question of comparison, weighing the different characters and motives of witnesses, as to their effect on testimony, and after this comparison, believing or disbelieving their statements. This is done as to every witness and to every motive of his; and if it can be done when all the restraining motives are in full operation, it may equally be done, when one or more may be removed. If then, the question of belief is to be raised, it should be after the delivery of the testimony,—as one affecting its credibility,—and not before and for the purpose of its rejection.

The fear of *divine* punishment(*f*) has probably less effect upon human

(*f*) In the report on the affairs of the East India Company made to the British Parliament in 1832, Part 4, Judicial, p. 9, are to be found the minutes of testimony taken before the committee.

Richard Clarke says, "prosecutions for perjury are frequent." "Int. 96. What is the effect upon the character of a native on his having been prosecuted for perjury and convicted? If the man is of a character, to which from rank or caste any degree of *respectability or sanctity* attaches, those qualities would not be affected by his punishment in the minds of the natives. I believe that persons holding office in the temples have been viewed with equal reverence, and treated with equal deference in regard to their spiritual authority, while under actual punishment for perjury."

W. B. Bailey, p. 88, says, "I am of opinion *that the use of oaths might be abandoned* in our courts of justice without injury, if not with advantage. . . . My own impression is that generally speaking, the moral sanction of an oath does not, especially among the lower classes, materially add to the value of native testimony; that the only practical restraint on perjury *is dread of the punishment* prescribed by law for that offence, and *that the fear of consequences in a future* state, or the apprehended loss of character and reputation among their countrymen, has little effect in securing true and honest testimony on the part of those who may be influenced by the bias of fear, favor or affection."

action than is generally imagined. Those who would disregard the present motives to truth, would regard little a future punishment, which by its very contingent remoteness loses its effect. The force of the religious obligation is generally united with the other sanctions for truth, but when tested alone, its weakness and inefficiency is perceived, as in the case of custom house oaths, test oaths, and oaths (in England,) to obey the obsolete statutes of the universities. In these and similar instances, the religious either stands alone or is opposed to the other sanctions, and is perceived to be an ineffectual check to false testimony. If it be alleged that all atheists are immoral, dissolute, &c., then the worse their character, the less the danger of undue reliance being placed upon their testimony.

An argument likewise is drawn from the oath administered.(*g*) "All witnesses before they are examined, are called to an oath, by which they appeal to the Supreme Being for the truth of their assertions, and imprecate divine vengeance on themselves if their testimony should be false." It is said to be absurd to administer an oath to those who deny its obligations, and who disbelieve in the existence of a future state of rewards and punishments. This may be so. But the atheist does not deny the *legal* obligations of an oath, and the pains and penalties attached to its violation, any more than he does those of any other law of the land. He ignores only all obligations of a religious nature, and his testimony is exempt from their influence. Were the witness to testify under the pains and penalties of perjury, the supposed absurdity would at once vanish. The objection, so far as it relates to the absurdity of an oath being taken by one who disbelieves in the existence of God, is purely *formal;* and the remedy is simple and at hand, *i. e.*, by a change in the words used in the form or ceremony by which the attention of the witness is particularly called to the truth of the testimony he is about to utter.

But atheism is a fact regarding the state of the mind, and the absurdity of its affording any sufficient ground of exclusion is very apparent, when one reflects on the only possible mode of ascertaining the fact. If the fact be proved by the statements of the supposed atheist upon the stand, by relying on them as a ground of exclusion, the court rely *in fact,* on his trustworthiness, and say that having, as they believe, spoken the truth in that instance, *the only one in which they have known him to testify,* he shall not be admitted to testify farther as a witness for fear that he will ever after perjure himself in the testimony he may give.(*h*) If he has stated an untruth, and is *not* an atheist, then, by the law of the land, he is admissible. Or, if being an atheist, he denies the fact, he must be admitted, for the witness alone knows the state of his belief at the time of his examination, and is not contradicted, though it should be proved that at some previous time he had admitted his disbelief in the existence of God. This is to offer inducements to the abandoned atheist to lie, and to exclude the individual who acts with integrity.

(*g*) See chapter XVI. on Judicial Oaths, where this subject is further discussed.
(*h*) Swift's Evidence, 47.

If the atheist has such a regard for truth, such a sense of moral obligation, (no matter how acquired) that in consequence thereof he acknowledges his disbelief in the existence of God, he would by that very admission be entitled to credit, inasmuch as if, in despite of the disgrace and ignominy consequent on the avowal of such opinions, and the great temptations resulting therefrom to conceal his opinions, he nevertheless acts with integrity, he shows himself possessed of extraordinary firmness, and an uncommon regard for truth, and might certainly be trusted as to other facts, in relation to which he would have no motive to swerve from the truth. The unprincipled witness who scruples not to deny his atheism and to assert falsely his belief in future punishments, would be received. So the rule can never be productive of good. It excludes the honest man who embraces that belief, and affords no means of detection, no security (where alone it is needed) against the dishonest atheist.

It is obvious that the best means of ascertaining an individual's belief, will be to inquire of him whose belief is the subject of doubt; and the preceding remarks are made on the supposition that the question as to his belief is to be put directly to the witness.(*i*) But in a note on 3 Black. Com. 369, Mr. Christian makes the following remarks: "I have heard," he observes, "a learned judge declare at *Nisi Prius*, that the judges had resolved not to permit adult witnesses to be *interrogated* respecting their belief of the deity and a future state." If by this remark it was meant, that the witness should never be inquired of, it would operate as a repeal of the rule, unless inquiries were to be made of other witnesses. But in Curtis v. Strong, 4 Day, 51,(*k*) it was decided that the declarations of a witness out of court were admissible to prove his incompetency, and that the witness could not be permitted in court to *explain or deny* the declarations imputed to him, because it would be *incongruous* to admit a man to his oath for the purpose of ascertaining whether he had the necessary qualifications to be sworn. This may be regarded as the existing law on the subject. However incongruous it may be to admit a man to his oath for the purpose of learning if he has the necessary qualifications to become a witness, it is certainly much more so, to rely for the same purpose on loose conversations, or unguarded statements unsanctioned by the penalties of the law. If the law be that proof of atheism is only to be had by receiving evidence extraneous to the witness, besides the absurdity of putting confidence in his statements for the purpose of discrediting him—excluding him by reason and in consequence of these very statements—it has the still more glaring absurdity of preferring hearsay evidence to direct proof under the pains and penalties of perjury—for to the motives arising from the fear of those pains and penalties, the atheist is amenable. The witness is regarded as worthy of credit as to his loose, casual statements—regarded as worthy of credit so far as he is known—he is excluded, because believing him, he is deemed unworthy of credit. His statements made without any securities for their trustworthiness are

(*i*) 1 Phil. Ev. 20.

(*k*) Jackson v. Gridley, 18 Johns. 99.

regarded as true, and serve for the exclusion of his statements under the penalties of the law, when the dangers of falsehood would be diminished and the safeguards for truth increased.

As the fact of atheism is only proved, so it can only be disproved by the declarations and conduct of the witness, whose religious belief is the matter in controversy. The witness cannot be sworn, "because it would be incongruous to admit a man to his oath for the purpose of ascertaining whether he had the necessary qualifications to be sworn."(*l*) He cannot be interrogated before being sworn, or after his statements have been received, either to explain, deny or qualify them, because "nothing can be evidence unless delivered under the sanction of an oath," and "the declarations of the witness not under oath, do not disprove" the truth of his statements. It seems, therefore, well established, that an infidel "can neither be sworn to disprove the fact, nor be permitted without oath, to make himself competent."(*m*)

The statements of the witness made out of court and reported, may have been misunderstood, misrecollected or misreported. When originally uttered, they were without the securities which the law regards so important for the truth of testimony. They were the unsworn remarks of the individual. When sworn to by the percipient witness, they are but hearsay. If the witness being present in court were interrogated, all the dangers incident to hearsay—to reported evidence—would vanish. The judge would see with his own vision, hear with his own ears. Besides, the *then present* state of mind of the witness, is the subject under investigation.(*n*) His past belief is only important as throwing light upon his present. But the past might be as the reported statements of the witness would indicate it to have been, but his views and belief may have changed. The action of the court is in all cases based upon the unsworn statements of the excluded witness. Uttered in their presence, they reject them—uttered in their absence and reported by same accidental auditor, they receive and act upon them, depriving the witness of all opportunity for correction, explanation or denial; preferring hearsay and loose statements to direct and immediate answers made in their hearing, and in answer to their own interrogatories.

But in truth, action, not belief, is the object of legislation. Government has no right to interfere with the religious belief of its citizens. This is a question between them and their God. Government should

(*l*) Jackson v. Gridley, 18 Johns. 99.

(*m*) Jackson v. Gridley, 18 Johns. 99.

(*n*) If the objection be want of religious belief, the party objecting cannot interrogate the witness, but must prove the witness's declarations. Perry's case, 3 Gratt. 632. U. S. v. Kennedy, 3 McLean, 175. 1 Greenl. Ev. § 370.

But upon this point the authorities differ. In Quinn v. Crowell, 4 Wharton, 334, the defendant called a witness, to whom the plaintiff objected, on the ground of an alleged want of religious belief, and the judge admitted the testimony of witnesses in support of and in opposition to the objection, and afterwards the person objected to was examined on his *voir dire*, and having testified to his belief, was admitted to give evidence in chief, and it was held not to be error.

It was held in 17 Ill. 541, that the court might hear the explanations of the witness, and then determine as to his admissibility.

never meddle with abstract belief; it should never expose a man to ignominy or disgrace for atheism or deism, or erroneous opinions of any description. The moment *those opinions* result in action detrimental to the community—the moment the immoral man is guilty of immorality,—the moment the atheist commits perjury, *then* the duty of government commences. If, because a man is an atheist it should therefore be presumed that he would commit perjury, and his testimony for entertaining such a belief should be excluded, why might it not equally well be presumed, that for the same reason he would commit murder, and thus government be justified in confining him for life. In other words, if he may be punished (and this exclusion is a punishment for opinion,) because it is supposed, without the preventive care of government in requiring his exclusion, that he would commit perjury; why should not government see that he does not have the power of committing every other crime, and as a precautionary measure, confine him for life. It is just as probable that from defect of religious principle the atheist will shoot the first man he meets, as that he will perjure himself the first time he is called as a witness; and he may with equal propriety be prevented by confinement for life from doing the one, as by exclusion from doing the other. The punishment is more severe in the one case than in the other; *but one meets thousands* of men, for every time he is called as a witness.

It seems however, in civil cases, that the objection of atheism is not to be taken to the testimony of a party wherever it is receivable; that the atheist may make affidavits in all cases where they are allowable, may swear to his answer to a bill in equity, and generally is admissible as and where any party is received. "The law in such cases does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man seeking *his own rights* in a court of justice."(*o*) But the law regards a belief "in the existence of an omniscient supreme Being, who is the rewarder of truth and the avenger of falsehood," as "an indispensable test of truth." But if indispensable, why should it ever be dispensed with? When "*his own* rights" are involved, the danger of perjury is the greatest possible. If the witness is unworthy of credit generally, why should he be received, when to the untrustworthiness of erroneous belief is superadded that of the interest of a party?

But while in civil cases, the atheist may receive the protection of the law, in criminal cases he meets with a total denial of justice. All imaginable wrongs may be committed upon his family in his presence, all conceivable offences may be committed upon his person or his property, and unless he can procure testimony of the requisite standard of belief, he is without the pale of the law.

The rights of others may be at stake. However important the facts within his knowledge, his testimony is rejected. It must be remembered, that proof cannot *be had by asking*, and whenever by the exclusion of the only existing proof (the witness being an atheist) the pun-

(*o*) 1 Greenl. Ev. 414, n.

ishment falls on the innocent individual, whose cause may require his evidence. Admitted, "when his own rights are concerned," he is excluded, lest he may be made "the instrument of *taking away those* of others." But if he testify truly, the rights of no one will be taken away. Why is he not, in the absence of all sinister motives, as likely by his testimony, to support just rights as unjustly to take them away? Why assume the falsehood of his testimony, and that its tendency will be to *take away* rights, when no motive is shown to induce false testimony? Why judge of the character of testimony before it is heard? But if a judgment must be passed upon the trustworthiness of a witness before he is heard, why should it be uncharitable? and so uncharitable as conclusively to determine that in the entire absence of all motives to falsehood, and with the presence of the ordinary motives to truth, it will be perjurious?

Nor is this all. It leaves it in the power of any man to be a witness or not. A believer, interested for one party and knowing facts adverse to his interests, has only falsely to profess an erroneous belief, and he is excluded. Wishing to be a witness, and being an atheist, he has only to express a change of sentiments and attend church,(*p*) and he will be admitted to testify. He alone determines whether he will be heard or not. If an atheist and a man of integrity, he is peremptorily shut out; if an atheist, and he will lie and deny his atheism, he is unhesitatingly received. The law does not even protect itself, excluding all honest and admitting all dishonest unbelievers, provided only that they are willing to render themselves competent by falsehood.

The rule of law has not a solitary benefit to counterbalance its unmitigated evil. The evil is less perceived because the numbers to be affected by the exclusion are few, and the instances when the excluded testimony may be needed, are rare.

(*p*) If "it could be proved by external signs, that there had been a change of mind, such as a pious and devout attention to religious worship, and a declaration in the belief of God and a *future* state of rewards and punishments, such proof *might* reinstate the witness, and entitle him to be sworn." Per Spencer, C. J., in Jackson v. Gridley, 18 Johns. 99.

But it seems a single declaration of a change of views made during the term, when the party making it is to be offered as a witness, and after he is advised that he will be objected to on that account, is not sufficient. Scott v. Hooper, 14 Vermont, 535. The inquiry arises, how many declarations will suffice, and when must they be made.

CHAPTER III.

INCOMPETENCY OF WITNESSES FROM INFAMY OF CHARACTER.

"THERE are many offences which our law considers such blemishes on the moral character, as to incapacitate from giving evidence in courts of justice; as treason, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, &c., and other offences of the same kind, which involve the charge of falsehood, and affect the administration of justice."(*a*) Individuals convicted of these crimes, upon whom judgment has been passed, are said to be incompetent from infamy of character, and are not even heard.(*b*)

The evils of this rule may be enumerated in a few words. To the extent of its operation, it licenses the commission of any and all crimes in the presence of and upon persons thus convicted, (none but convicts being present,) and completely annihilates all rights of person or property, when those rights can only be established through the medium of this

(*a*) 1 Phil. Ev. 24.

(*b*) "Publico judicio damnati et non in integrum restituti, admittendi non sunt ad testimonii fidem." Dig. lib. 22, tit. 5, de Testibus, art. 3, § 5.

"Denique ex eodem sibi recte collegere videbantur vacillare fidem judicio publico damnatorum, criminis accusatorum, vel in vincula publica conjectorum, calumniæ in publicis judiciis damnatorum, senatu motorum, paganorum apostatarum hæreticorum, damnatorum ob carmen famosum, ob corruptionem, acceptamve pecuniam ut testimonium vel dicerent, vel non dicerent, *mulierum* quæ quæstum corpore fecerunt, eorum qui vitam ad cultrum depugnandasve bestias locarunt, omnium, denique viliorum et pauperum, *quamdiu aliorum est copia*." Heinnecii Elementa Pandectarum. lib. 22, tit. 5, § 139.

"The depositions of those who are rendered infamous by any condemnation ought to rejected. . . Not only the loss of a state of good fame, but even the suspension of that state, by a *decret* for the apprehension of a person, is a ground for rejecting his deposition; because for a witness to be worthy of credit, it is not sufficient that he should be free from crime, he must also be free from all legitimate suspicion." 1 Ev. Poth. part 4, c. 2, art. 8, § 790.

By the Scotch law, "*Infamia juris*, that is to say, infamy ascertained by a legal sentence, is in general the only ground of exclusion under this head." Glassford on Ev. 401.

"La deposition judiciaire d'un témoin qui a subi une peine afflictive *définie*, (et limitée par loi, ou même toute autre peine correctionalle,) n'est point admissible dans une accusation semblable à celle qui a amené la condemnation de ce témoin. Dans toute autre question différente le témoignage de ce témoin sera valable; ainsi celui que aurait subi le peine portée contre tout musulman qui s'enivre serait admis à témoigner dans une accusation pour injure et diffamation. Mais s'il s'agissait d'un musulman convertè qui, avant son islamisation aurait été puni pour s'être enivré, cette punition ancienne ne pourrait motiver le rejet du témoignage après cette conversion." Principes de legislation musulmane, par Khalil Ibn-Ish'âk traduit par M. Perron, 5 tome, 209.

sort of evidence. The benefits of a contrary rule would, of course, be the prevention of those evils.

The objects of courts being to ascertain the truth, and the only evil to be guarded against being wrong decision, it is perfectly immaterial what or how infamous the witness may be, provided, when called on the stand, he speaks the truth. This being the only object of the introduction of any witness, it follows, that if a person convicted of theft be as likely as any other individual not so convicted, to state the truth, he answers equally well the purpose of his introduction, and should be heard. Neither infamy of character, nor deformity of body, affords a valid reason for rejecting testimony which is probably true. However desirable it might be that none but witnesses of high moral character should ever be introduced, it would undoubtedly be still more desirable, that no occasion should arise for the introduction even of such testimony; that is, that litigation should cease. But as this is utterly hopeless, and as it is impossible to foresee every dispute which may arise, and to pre-appoint the testimony, and as there are frequently no witnesses of a contested transaction, but those whose characters are thus tainted with infamy, the question occurs whether the ends of justice would be better served by the introduction of such testimony, however dangerous it may be, than by its rejection. If other testimony be attainable this will never be offered. It might as reasonably be supposed that a party would prefer the interests of his opponents to his own, as that he would introduce secondary, when the best evidence was within his reach; a man of less when a man of more credit might be obtained. The question therefore is, whether, when as full evidence as by possibility might exist, cannot be had, that shall be rejected which is within our power; whether the light of the sun being unattainable, total darkness should be preferred to the dim and uncertain light of the twinkling stars.

In discussing every question of exclusion, the argument for general admission is so cogent, that the burden of proof lies on the objecting party to support his position; to show a preponderance of evil resulting from the reception of that particular species of evidence he seeks to exclude.

The strongest objections which can be urged against the admission of a witness convicted of crime, are a *presumed*(c) want of truth inferred from the moral turpitude displayed in the commission of previous crimes, and the inefficiency of moral restraints upon such witness, and the probability that, if he should testify untruly, the judge of fact will, from some cause, place undue reliance on this evidence; for if the witness testify truly, or if no more than the proper credit be given to his statements, the rights of the parties or the interests of the community will not suffer. In other words, the advocates of exclusion say that there is preponderant probability that the witness will perjure himself, and that his perjuries will be credited.

(c) "It cannot reasonably be expected that such a person would regard the obligations of an oath. By the turpitude of his conduct he has shown that he is regardless of laws, human and divine."—1 Starkie Ev. 82.

To justify this result, it is inferred, from the commission of one crime, that the individual committing it, will further commit perjury whenever he shall be called upon to testify in a court of justice. It is undeniably correct, that the fact of a witness's having once violated the laws of morality, is a good reason why less reliance should be placed on his statements than on those of an individual of irreproachable reputation. It is a well known rule of law, that every man is to be presumed innocent till his guilt is established by satisfactory proof. But the principle of exclusion reverses that salutary maxim; it rejects the witness not for actual, but *presumed* want of truth and on account of supposed prospective guilt. The convict can and *may* speak the truth. Because a man has committed theft, it by no means follows that he will commit perjury. Because he has violated one law, it is by no means sure that he will violate any or all other laws upon the statute book. Does the father never again question a child, who has once told an untruth? After having once felt the punishment of the law for its violation, it by no means follows, that from some peculiar obliquity of taste, the criminal will again court its penalties. Take the case of perjury: and let the inference be, that because the witness has once perjured himself, he will again do the same the next time an opportunity occurs. Who does not perceive such an inference rash and unfounded? Were an individual on trial for theft, what magistrate would consider the record of a *previous* conclusive proof of the *subsequent* supposed theft in the absence of all other evidence. But this rule of exclusion conclusively infers perjury from some precedent delinquency, and it allows no evidence to disprove this inference. The case in which the perjury was committed, was one in which the balance of conflicting motives induced the commission of that crime; but it furnishes no certainty that the same crime would be committed under different circumstances. Indeed, unless the present penal code be deplorably inefficacious, even in a case perfectly similar, the probability is, that having once suffered the penalties of the law, he will not again provoke them. The commission of other crimes affords still less proof, from which this species of guilt is to be inferred.

"The law excludes those," says Mr. Greenleaf,(*d*) "who have been guilty of those heinous crimes, which men generally are not found to commit unless when so depraved as to be unworthy of credit for truth. The basis of the rule seems to be that the witness is morally too corrupt *to be trusted to testify;* so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath as to render it extremely improbable that he will speak the truth at all." That there are offences which should exclude the witness, seems to be assumed as right. Still "it is a point of *no small difficulty* to determine *precisely* the crimes which render the perpetrator *thus* infamous." They must, however, be those which "imply such a dereliction of moral principle as carries with it a *conclusion* of a *total* disregard to the obligation of an oath." In other words, the offence must be such an one as will justify the conclusive inference of future from past crime. The

(*d*) 1 Greenleaf on Evidence, § 372, and passim.

law makes this a legal presumption, and does not permit its disproof. Were the witness heard, and his credibility submitted to the consideration of a jury, all would be right. But this is not done. A witness is excluded, because from the commission of a past offence it is inferred *conclusively* that he will perjure himself whenever called on to testify. But what and how great is this probability of future from past crime? The offence, whatever it was—on account of which the exclusion takes place—however great its moral taint—however atrocious its character—was committed under the influence of powerful motives then operating on the mind of the culprit—motives so strong as to overcome all moral restraints. But unless some motive or motives of the greatest strength are acting upon the witness, will he commit a second crime? Because one crime has been committed, it by no means follows that the same person will again commit another under the same circumstances—still weaker is the inference if the circumstances are changed, and every motive points in a contrary direction. Lives there the man, lived there ever the man so corrupt that he would commit crime without motive? Is it conceivable? Examine then the situation of the witness—the various motives which may reasonably be presumed as likely to influence his conduct—allow them their fitting and appropriate significance—hear all the evidence that may be offered touching his character for truth and veracity, and then after it is heard, determine as to the truth or falsehood of the testimony received—but never refuse to hear.

But if punishment has been imposed and suffered—punishment such as the law, regard being had to prevention and reformation, has adjudged meet and proper—it may be presumed sufficient, if there be any preventive or reformatory effect in punishment, to prevent the repetition of crime on the part of one who has once suffered. If not sufficient, it should be increased. If increased indefinitely, and no such effect is had, then is the infliction of legal punishment pure and unmixed evil. If the law neither amends by its sufferings, nor prevents by its terrors, it can only be considered as the application of so much physical force, by which during a given period of time the criminal is restrained from injury to society. If the law is of any service, either by way of amendment or prevention, then one who has once endured its penalties, would be less likely to err even to promote his imagined interests—still less would he be disposed to commit crime, when the rights of others are involved, and for their benefit.

In all cases, where there is no sinister interest, no motive to seduce from truth, the worst equally with the best man, is entitled to credence, *unless* it be considered sound reasoning to suppose an effect without a cause.

The convict is of the same common nature, actuated by the same desires, incited by the same hopes, and deterred by the same fears, which influence the action of others. The commission of any given crime shows that under a certain combination of circumstances, he had not sufficient firmness to resist temptation, and affords ground to believe that where his own interests are in issue (*and in no other case*) he would more readily than another yield to temptation,—that motives

preventive of crime have less weight with him than with others—not that they have *no* weight. It is a stain on his character, on account of which a deduction should be made from the credit otherwise to be given to his evidence, and of the effect of which the jury can judge as well as of any other discrediting circumstances.

So stands the argument as to the probability of the truth of his statements. If then his evidence being necessary, be rejected, certain evil, inevitable misdecision is the result; while if received, the worst that happens is, what is sure in the event of exclusion; that is, certain is preferred to doubtful and contingent evil.

If then the witness, whether his testimony be true or false is admitted, still unless *undue* reliance be placed on his testimony no evil ensues. The position that there will be this error, assumes for its basis either imbecility or dishonesty on the part of the judge of fact, and so far operates *only* as an argument showing that there should be a change of judges. The evil, remember, is *undue* reliance on this *suspicious* testimony. The judge, who can in other cases weigh and compare testimony, can equally well do the same in this. A witness comes forward, having at some previous time been convicted of perjury. He comes with the mark on his forehead. The jury (if the trial be by jury,) are cautioned by counsel and judge, and by the proof of his recorded infamy. Would every word he uttered be likely to be received implicitly as truth? Would the danger be, that thus forearmed and forewarned, he alone would be too dangerous to be heard? so dangerous that he must be excluded? Would not the danger rather be, that his evidence being true, would be disbelieved, than that being untrue, it would be credited? Is there such magic in falsehood? The judge says, this is suspicious, dangerous evidence,—too doubtful to affect the rights of parties; and yet knowing its doubtfulness—the suspicion adhering to it,—for fear he shall believe, he dare not trust himself to hear it. "Strike, but hear." Judge but hear;—would he not be better prepared to judge of the truth of testimony *after* its delivery than before? The evidence, when disbelieved, produces no direct effect. It is the same as if not heard. If it would be believed, then the legislator, who establishes the rule of exclusion, assumes on his part, that he is a better judge of the truth of the statements of an individual of whom he is utterly ignorant, than the tribunal which sees his manner, hears and compares his testimony with the other evidence adduced, and after this comparison, gives credit to what he utters.

But this pious horror of crime, this virtuous indignation at guilt will not alone suffice for exclusion; mere crime, however atrocious, and however fully admitted, never excludes. With the old Spartans, theft *per se*, was well enough,—rather approved than otherwise. The detection it was which was considered worthy of punishment. So with the common law. The *judgment* it is which excludes. The avowed but unconvicted thief or perjurer is a competent witness. The accomplice, testifying under the expectation of pardon or the hope of reward, equally guilty with the accused whose conviction he is seeking to procure, is heard; and to his testimony, laden with the guilt of crime, and induced by the hope of

pardon, the law takes no exception. The guilt in each case the same,—associates in crime,—the accomplice, with pardon dependant upon his testimony, is received to convict, while the associate, if convicted and sentenced, would not be heard to testify in a cause between other parties in which he had no interest. This admission "is justified by the necessity of the case," as if *any necessity* would justify the admission of those who had committed crimes, which carried with them "a conclusion of a *total* disregard to the obligations of an oath."

But the judgment is not always enough. Neither the crime nor the judgment will exclude, if the conviction shall have taken place in a state other than that in which the witness is to be examined. This "insensibility to the obligation of the oath," this recklessness of "the distinction between truth and falsehood," this moral corruption of the witness, are matters "strictly territorial."(*e*) This judgment may however "be shown in diminution of the credit due to his testimony." But the same crime is no worse in one state than another. If "the conclusion of a *total* disregard to the obligations of an oath" be correct in one state, why is it not equally so in all? If this inference of the law be well founded, why should not increased efficiency be given to so wise a rule, and its application be of universal extent. But if on the other hand, the evidence of avowed criminals—of convicts from other states has been and can be received without danger, their crime being "shown in diminution of the credit due" them, what reason is there why the law cannot be safely changed, and all convicts be admitted, subject to such just deductions from the weight of their testimony, as in each case the jury may deem proper?

This taint—this "disability," it must be borne in mind, arises from a recklessness of "the distinction between truth and falsehood," and an insensibility to the "restraining force of an oath"—both unfortunate defects in a witness, but happily they are found removable, and thus a way found by which the convict equally with the unconvicted accomplice may be heard.

The various modes of "restoring competency," the sovereign remedies by which all danger is removed, and the mouth of the witness opened, can scarcely be mentioned without a smile. To pass by the sham process of "confessing error in the record," or the mystic virtues of burning in the hand, as recognized means of expelling mendacity, a remark or two may be made with regard to pardons,—whether by statute or under the great seal; the "most effectual modes of restoring competency,"(*f*) and the only ones in vogue in this country. The others, though possessing no ordinary virtue, have been little tried here. It would hardly be supposed that a witness would be more trustworthy the moment after than the moment before a pardon; and indeed it seems that some have

(*e*) 1 Greenleaf on Evidence, § 376. This it seems is a "disqualification not arising from the law of nature, but from the positive law of the country." The authorities are conflicting as to the effect of a judgment of an infamous crime passed by a foreign tribunal upon the admissibility of testimony. Com. v. Greene, 17 Mass. 515; State v. Candler, 3 Hawks. 393.

(*f*) 1 Phil. Ev. 29.

thought "that a pardon could only remove the incompetency and not the blemish." But such absurd notions have given place to more reasonable ideas, it being now clear that a pardon, whether under the great seal or by act of parliament, "makes the witness a *new* creature and gives him a *new* capacity." If such be the virtues of the seal or of parchment, (and if such are not the effects, it will be difficult to tell what they are,) it seems unfortunate that they are not oftener tried to the utter removal of all falsehood. However, as a quack remedy by which competency may be restored, it is not without its use.

The absurd and evil consequences of the rule of law by which infamy of character, as established by conviction, is made a ground for the exclusion of testimony, was most strikingly illustrated in the trial of Abner Rogers, for the murder of Charles Lincoln, a warden of the Massachusetts State Prison.(*g*) The accused was a convict, and the only witnesses by whom the crime could be proved were the fellow convicts of the prisoner. That they saw the crime when committed, if committed; that there were no motives perceptible, at least, which would be likely to induce false testimony; that they were willing to narrate what they saw; that without their testimony crime would go unpunished, they being the only witnesses by whom it could be proved, were reasons which would have been regarded sufficient by an unlearned layman, ignorant of legal rules, to have at once received their testimony, and after making such deductions therefrom as the tarnished character of the witnesses would seem to require, to have decided in accordance with the convictions of his understanding. It would never have occurred to him, that to procure a chance for the conviction of one, all the convicts whose testimony might be important or necessary for conviction, should be turned loose upon society, and that this was a matter of legal necessity, so stringent, that if not done, the assured impunity of the criminal was a matter of the

(*g*) Trial of Abner Rogers, jr., reported by G. T. Bigilow and George Bemis. In the above report are to be found the following remarkable paragraphs, illustrating most strikingly this branch of law.

"John P. Reed, called and sworn. (It was agreed that the witness had been *pardoned* by the governor to render him *competent* on the part of the prosecution.")

"Joseph Tully, called and sworn. (This witness it was agreed *had been made a competent* witness on behalf of the government by pardon.")

"George H. Savery, called and sworn. (This witness it was agreed *had received a pardon to enable him to testify* on behalf of the *prisoner*.")

"William Bevenel, called and sworn. (This witness had been rendered partly *competent by pardon and partly by writ of error*.")

"Bernard Lander called. Objected to by the State's attorney as incompetent from having been convicted for receiving stolen goods. Record offered, showing his conviction of that offence and his commitment to the States prison. The witness was *rejected*."

"Henry Rockford, called and sworn. Objected to, as having been convicted of petty larceny in the Police Court of the City of Boston. Pardon produced by the witness."

Abner Robers was indicted and tried for the murder of Charles Lincoln, jr. The law presumes all accused innocent,—it presumed him innocent. The verdict of the jury was in accordance with the presumption of law. One person not having received a pardon was rejected as a witness—not because his testimony might not have been true, and of vital importance to the prisoner, but because he wanted the pardon so necessary to technical competency—so unnecessary to testimonial veracity.

most entire certainty. Not so the common law. That presumed the prisoner innocent, and in this case the verdict of the jury was in accordance with this presumption. Yet five individuals, convicts, whose guilt was as satisfactorily established as guilt ever can be, justly suffering the penalties imposed by law, were pardoned, not on account of any good conduct or peculiar veracity of theirs, but simply that thereby they might be made competent witnesses. A sixth was called, but no pardon being produced he was rejected. A just punishment for an offence committed was in each instance of the pardon remitted. The punishment of innocence and the escape of guilt are both disastrous to society. The remission of a just and fitting punishment of a crime, for a cause totally unconnected with the character or conduct of the pardoned convict, is an evil great in proportion to the justice of the punishment thus causelessly remitted. If the punishment was just the pardon was unjust—a violation of the will of the legislator. To aid in the conviction of one whom the law presumes to be innocent, any supposable number of those known to be guilty are relieved from the punishment which of right they should suffer.

But why pardon ?(*h*) Is there any magical virtue in "the great seal?" Does it resemble, in its moral efficacy, the royal touch in its healing virtues? The one heals disease; does the other cleanse from sin? Does the great seal remove "this presumed total disregard to an oath?" Does it confer new sensibilities to its obligations? Why in the case referred to, were five convicts pardoned? Did the "great seal" change the evidence, which these convicts would have delivered, from falsehood to truth? Were these witnesses after pardon, any more deserving of confidence? Was their testimony any more likely to be true than that of their fellow-convict, who was not among the lucky ones, from whom all moral taint was removed by the supernatural virtues of a "great seal?" If the trustworthiness of the witness is not increased, nor his testimony changed, then, of what conceivable benefit is the pardon? If the testimony was made more reliable, cannot legislative wisdom devise some mode, by which the virtues of the "great seal" as a preventive of falsehood, may be further extended? If the pardon is inefficacious, as respects the witness, does it enlarge the sagacity of the judge or increase the discernment of the jury? If not, if no effects ensue from this mummery, if the trustworthiness of the witness is not increased, nor the capacity of the judge enlarged, nor the discernment of the jury rendered more acute, then all that has been accomplished is, that criminals expiating their offences by suffering the appointed punishment, are turned out again to commit new depredations; justice is defrauded of her due, and nothing whatever has been gained, save by the criminal; for the pardoned witness might just as well have been heard without the

(*h*) "Formerly the objection to the competency of a witness arising from a conviction of a crime inferring infamy was indelible, and not to be removed except by the royal pardon, or by act of Parliament; no lapse of time or endurance of punishment could efface the stain attached to the character by the conviction. And this, *supposing the objection of incompetency founded on infamy to be in itself expedient, appears to be the necessary consequence of the conviction.*" Tait on Ev. 346.

pardon as with; as well permitted to testify when his offence is evidenced by a judgment, as by his own admissions; when committed within as without the state where the trial is had, leaving it to the jury to place such reliance on the testimony as they may think, under all the circumstances, it is entitled to. If competent to judge of the veracity of a pardoned convict, will they be hopelessly at fault if the convict should testify before them without any pardon?

But the truth is, the pardon is a silly device to evade the consequences of a bad rule. But this it does not necessarily accomplish. The prisoner may need the testimony of a convict, to establish his innocence. The pardon so necessary to technical competency, so unnecessary to testimonial veracity, depends on the will of the executive magistrate of the state, and it can hardly be supposed, that he will pardon proven guilt, for the purpose of facilitating the escape of a prisoner, though if not done, even innocence should suffer. The rule is full of evil, and that continually, without a particle of alleviating good. Important witnesses may thus be shut out, the truth excluded and justice be perverted. The consequences will fall not on the party guilty—the convict—for to him the utterance of testimony is a matter perfectly immaterial, but on the party in the right, who is entirely without fault, and whose misfortune it is to be thus deprived of evidence, which may be true and necessary to the attainment of his just rights. Experience has fully shown, that no evils have resulted from the admission of the accomplice or of pardoned convicts,—and if none in those cases, there can be none in any.

It has been recently enacted in England,(*i*) that enduring the punishment to which an offender has been sentenced for any felony not punishable with death, has the same effect as a pardon. This has been deemed all wrong by men learned in the law,(*k*) punishment in its preventive or reformatory effects being in no respect equal to the great seal.

But the rule of law by which persons convicted of infamous crimes are excluded from testifying, has its exceptions, which are in principle utterly at variance with the rule as originally established. The convict, if a party to a suit, may make an affidavit in his own defence, but not as complainant. Here, in the very worst form of testifying, where the witness is unquestioned, uninterrogated, his interests being involved in the result, the convict is allowed to testify under the additional disability of interest—as if any conceivable danger arising from this testimony were not more than doubled under such circumstances. Yet, his affidavit is admitted; and why? Because, "otherwise he would be without remedy;"(*l*) a good reason undoubtedly, indeed the only reason why testimony is ever given; but equally applicable to the case, when without such testimony, others "would be without remedy," and when the evidence would be given under circumstances infinitely less objectionable.

The witness, too, whose character for want of truth is notoriously bad, is received, and this want of truth is urged as an argument against

(*i*) St. 9 Geo. 4, c. 32, § 2.
(*k*) 1 Phil. & Am. on Ev. 25.
(*l*) 2 Starkie, Ev. 723.

his credibility. In this case, a witness with a *proved* want of truth, is admitted, while in the exclusion of the convict, a supposed and inferential want of truth is the reason for rejecting his testimony.

The accomplice is every day admitted "notwithstanding the turpitude of his conduct," and yet the evils anticipated from the admission of men infamous for crime, not merely does not occur, but their evidence is deemed indispensable to a wise administration of the law; as without such proof, it is "often impossible to bring the principal offenders to justice." In this instance, proof of *present* depravity, the fact alone worthy of regard, (for past is only adduced to prove present depravity,) is more clear and decisive than it can be in any other case. Persons formerly convicted may have changed their character, or the conviction may have been erroneous; but here the guilt is recent, and the proof conclusive. So far, therefore, as regards present depravity, the accomplice is less entitled to admission than the convict. *Policy*(*m*) and necessity are the reasons given for the admission of this testimony, as otherwise the greatest crimes might escape unpunished. But if guilt be a ground of exclusion, and if the testimony of persons of such character is too doubtful and suspicious to be introduced in civil cases, much more should *policy* and *necessity* reject such evidence in criminal cases, where reputation, liberty, and even life itself are at hazard. Infamy or interest—either excludes testimony, says the judge, and as proof of this truth, up steps on the stand the accomplice, confessing his guilt—the traitorous accomplice,—who swears under "an implied promise of pardon;" who "has an equitable title to recommendation for the king's mercy," and who, to the unlearned in the law, would seem excluded on the double ground of interest and infamy. The taint on the character, the moral guilt of the individual, the doubt and suspicion attached to the statements of him who is condemned out of his own mouth, are equally great, as if the guilt were proved by the production of a record. If there be danger from the thief, whose recorded guilt is adduced against him, it is none the less because the witness voluntarily admits his guilt. The law, in a spirit of mercy, says, that it is better that ten guilty men should escape than that one innocent man should suffer. How important, then, would the rejection of this evidence be deemed by the exclusionist, were he consistent? But in fact, if any judgment can be formed from the experience of centuries, no evil has resulted from the admission of accomplices, or if occasional evil, it is more than balanced by the benefits resulting from the admission of this species of proof.

But this exclusion is sometimes said to be a part of the punishment attached to the offence. As a punishment of the guilty, it is utterly nugatory—as if an individual, whom other motives would not restrain, would be influenced by the fear of not being permitted to testify where the interests of others were involved. The real punishment falls not on the guilty, but on the innocent,—on him whose misfortune it is to need such testimony, and whose rights are impaired by its rejection.

(*m*) Policy and necessity, says Phillips; policy and *perhaps* necessity, says Starkie; the necessity of the case, says Greenleaf. 2 Starkie, 19; 1 Phil. Ev. 31; 1 Greenl. Ev. § 379.

The admission of the accomplice may be regarded as in reality an exception to the rule under consideration, though not technically so, as neither the crime, nor the punishment, nor the conviction, but "the judgment alone creates the disability;" and even then, only in the state where the judgment was rendered. To most it would seem that if there be danger from such evidence, sufficient to warrant its rejection, the rule should be co-extensive and commensurate with the danger: whether the criminality or the infamy arising from the criminality, be proved by the admissions of the party or by the record, whether the deed be committed within the jurisdiction of one state or that of another.

But the accomplice guilty by his own admission, the pardoned convict, the convict unpardoned, if his crime however heinous has been committed in a foreign jurisdiction, are received and heard without fear of misdecision or any apprehension of danger to the cause of justice. If the admission of such testimony be justified by experience, there would seem little reason for excluding that of the unpardoned criminal, because his hand may not have been burned, or because he may not have received a pardon under a great seal or a small one.

CHAPTER IV.

INCOMPETENCY OF WITNESSES FROM INTEREST.

In the preceding chapters we have shown, or endeavored to show, the impropriety of those rules of law, by which, in case of the atheist, the want of one of the sanctions to truth, and in that of the convict, the supposed weakness of all those sanctions, have, even in the absence of all motive to falsehood, been considered as sufficient reasons for the exclusion of their testimony. In the case now about to be examined, a different reason for the rule of exclusion has been given. In all systems of law, men stand excluded to a great and indefinite extent, for no reason, but because they are exposed to the action of this or that species of motive, without any inquiry whatever, whether the motive which excludes, will lead in a *sinister* direction; or, if leading in that direction, whether there may not be opposing motives of sufficient strength to counterbalance this bias; or whether, even if this sinister motive should have an overpowering force, there be any danger that the testimony, being false, will be received and acted upon as true.

By the civil law, which is in force over almost the whole continent of Europe, father and son, patron and client, guardian and ward, are mutually excluded from giving evidence for each other: a servant or dependant is incompetent to give evidence for his master, and the testimony of a friend or enemy is regarded with great jealousy.(*a*) In Louisiana,(*b*) ascendants cannot be witnesses with respect to their descendants, nor descendants with respect to their ascendants.(*c*) By the common law, those above excluded, are admitted as witnesses, but "all those who have any legal, certain, or immediate interest in the result of the case, or in the record as an instrument of evidence, are dis-

(*a*) Vide Hein. ad Pan. lib. 22, tit. 5, s. 140, 14.

(*b*) Code of Lou. art. 2260, 2261.

(*c*) In the Belgic code, recently promulgated, some useful and important innovations have been proposed. The only absolute exclusions are those of the husband and wife of a party to the cause, and all his relatives in a direct line. But the relatives and connections of a party in the cause in a collateral line to the fourth degree, the presumptive heir or servant of a party, all directly or indirectly (pecuniarily) interested, all persons convicted of robbery, theft, of swindling, or those who may have suffered any punishment that renders them infamous, are said to be *reproché;* probably referring to the old rule of Roman law, by which the evidence of two witnesses is conclusive (*plena probatio*) in certain cases; and meaning that a witness of either of the classes enumerated, shall not be a witness for that purpose; that is, of forming a *plena probatio* with one other witness; but that, for every other, they are admissible. Vide Bentham's Rationale of Ev. vol. 5, 745, 746.

qualified."(*d*) And those thus disqualified, are excluded "from a supposed want of integrity."

Excluded "*from a supposed want of integrity!*" as if pecuniary rights and obligations—rights and obligations which are the results of law alone—can neither be acquired nor retained, but by a sacrifice of all claims to integrity. Does it never happen that such rights are acquired, or, being acquired, are retained, with integrity in their possessor? No matter whether those rights be sought after or retained with or without the aid of courts of law, there will be equal integrity in the individual demanding or retaining; and if an individual will sacrifice, to obtain his objects, all claims to integrity *in* courts of justice, there is no very good reason to suppose him more scrupulous when *out* of those courts.

Still want of integrity, unless followed or likely to be followed by perjury, is no sufficient reason for the exclusion of testimony. In the rules for this purpose, to render them proper, the assumptions are, that the interest, pecuniary or other, (for which the witness is rejected) will have an effect adverse to the truth; that is, it is an interest unjustly claimed by the plaintiff, unjustly withheld by the defendant; that the witnesses on either or both sides, if interested for the parties respectively calling them, will, to promote those interests, perjure themselves; and that perjured, they will, probably, nevertheless be believed, and, being believed, misdecision, to the prejudice of one side or the other, will be the result. It must be considered as preponderantly probable, not that some one or more of, but that *all* of these results would ensue from the admission of the now excluded testimony, or else the rule cannot be supported. If, for instance, the interest which excludes, be it social or pecuniary, be in accordance with the truth, the greater the interest the greater the security for veracity, and the less the probability of falsehood. Or, if, in case of the interest under consideration, acting in a sinister direction, there should be motives to veracity sufficient to prevent falsehood; or if, whether true or false, the testimony delivered should receive *no more* than a proper credit; or if, being false, and yet obtaining credence, misdecision should *not* be the result; no evil, as far as the ends of justice are concerned, is done.

The conduct of an individual in giving testimony, as in every other act of his life, will be the result of motives; and whether veracity be the result, will depend on the motives to which he is exposed, and on his sensibility to their action. Of the whole field of human action, however trivial or important, there is nothing, which is not the result of motives equally trivial or important. Mental or physical motion is alike caused by some force applied, and it might as rationally be supposed that *inert* matter would move of itself, without any extraneous force, as that any human action should take place, without some motive or interest inducing.

The work of the memory is easier than the work of invention; the difficulty, the labor, of framing falsehood with success—of keeping out of view true facts, and bringing forward false ones, and of making those

(*d*) 2 Starkie, 744.

false ones appear as true,—the mental labor attending all this, and the love of ease to prevent, the fear of shame, the disgrace which, as far as the public is concerned, is known and seen to attach to falsehood in general, and to false testimony in particular—the fear of present and future punishment, a fear in proportion to the severity of the punishment, present or future,—all constitute motives in every case (the fear of future punishment in the case of the atheist excepted) to prevent falsehood. These motives act with their ordinary force on all witnesses, whether *interested* or not; and with not the less force, because the individual subject to them may have some pecuniary interest. They act (with rare and casual exceptions and not requiring consideration,) in favor of truth. Truth, then, will *always* be the result unless there be some *one* or *more* motives acting in a sinister direction with power sufficient to overcome these standing securities for truth. Of this there is the same certainty as that the ball, set in motion, will move in a direction and with a force corresponding to that of the impelling power.

But of the motives affecting human conduct, whether in giving testimony or in any thing else, there is no one, which acts in a uniform direction; no one which may not act equally for the promotion of truth or of falsehood. Take the case of a person on trial in a criminal prosecution, who is excluded, because, from a wish to preserve his own life, it was supposed he would, if admitted, perjure himself. If the individual so rejected were innocent, every word he utters being consistent with other facts in the case—every truth he states being corroborated by truths uttered by others,—will aid him in proof of his own innocence; and falsehood being known and universally considered to be a sign of guilt, by this very motive of self-preservation he will, being innocent, be induced to utter the truth. If guilty, fearing, dreading the truth, knowing that by its utterance his doom is sealed, he is driven to falsehood as the only means of escape. Filial affection, the father being in the right, will act in coincidence with and be promotive of the truth; he being in the wrong, the same motive will act with a tendency adverse to the truth. So, too, of every other motive to which the human mind is subject, there is no one which is not capable of acting in a direction favorable or adverse to the truth. No individual, then, should be excluded, because he is exposed to the action of any given motive, for the direction of such motive can never be foreknown.

Neither can a certain inference be drawn as to the truth, from the *number* of motives to which a witness may be exposed. The motives on one side may be weak and on the other strong to any degree of strength. Suppose half a dozen motives acting in favor of truth, yet they may all act with so feeble a force as to be overcome by some one motive acting with extraordinary activity in a sinister direction. If, then, in case of six acting in favor, and one adversely to the truth, the inference drawn from *numbers* merely, that truth is the result, is not conclusive; still less probable is the opposite presumption, that of the preponderance of one motive over the opposing six.

Nor do the *species* or *number* of motives afford a sure ground of inference, for individuals are as diverse in sensibility as in character, and

a motive, which, with one, might be all powerful, with another might exert an influence scarcely perceptible. Fear of shame might restrain one individual, while with another, it might be weak and inefficient in its action. Equally variant, as far as the *same* individual is concerned, may be the force of any given motive at different times and under different circumstances. Motives of strength to-day, in one direction, may to-morrow lose their power, or their force may act in an opposite direction.

There are, then, no motives acting with a uniform tendency, nor with the same force on different individuals, nor even on the same individual at different times. They are not, like the levers and pulleys of mechanics, the subjects of precise and close calculation. The heart of man is not subject to inspection, his motives to knowledge, nor his passions to measurement. The conduct of an individual will depend on the comparative number and strength of the motives respectively leading to truth or falsehood, and on his sensibility to their action. Attention to *one* motive, or the *number* of motives, only, might lead to error. Though it were certain, that any one motive of great power, or any number, were acting in favor of mendacity, still, unless the opposing motives, and the sensibility of the individual in relation to these motives respectively, were taken into account, it is obvious, the conclusion would be erroneous. Probity in respect to giving testimony, as in other cases, is relative rather than absolute. *Absolute* certainty is unattainable. One individual is better, his statements more credible, than those of another; but of no one can it be said, that every thing he utters will be true, or will be false, any more than that every thing he may do will be right or wrong. Truth or falsehood can never be foreknown; and *no one*, for any supposed probable results of his testimony, should be excluded.

It is utterly impossible to form any well-grounded prediction as to the truth or falsehood of the statements of any witness, from the mere fact that he is exposed to the action of this or that motive. How absurd then the law, that, even without any survey of the circumstances in which the witness is placed, without any knowledge of his character, without the trouble of an examination to ascertain, as far as is ascertainable, those facts, by a rigid and unbending rule, excludes—condemns,—the individual without hearing him.

But improbity in no one form, and in no one form more than another, should be presumed. Whatever reason there may be to anticipate perjury in any individual in the support of any claim he may have, when called on to give testimony in support of that claim, there is *equal* reason, neither *greater* nor *less*, to suppose that, for the same interest, with an equal chance of escape, he would suborn witnesses and forge a deed. All interest being to be supported by dishonest means, or rather by the law presumed to be so supported, false testimony will be no more likely to be resorted to than any other form of improbity, only as it seems more or less likely to promote the dishonest ends proposed. And if perjury be so probable, and be presumed to result from so slight motives as we shall see that it is assumed to result from, in parties and in witnesses, it would be but a necessary and proper extension of the rule of supposing

improbity, to presume all parties *suborners*; for the difference of crime is trifling, and if the party would perjure himself, he would suborn others, and all witnesses thus be *suborned*. If an interest of one shilling is to be the ground of presuming perjury for the purpose of exclusion, there seems no reasonable doubt that those, who would forfeit their integrity to retain that sum, will do the same to acquire a greater. Upon this principle all testimony would be excluded. The reasoning by which one form of improbity is presumed, is equally applicable to every other; and he who anticipates perjury as the common and ordinary course of all, who have any interest in dispute, should not scruple at the further extension of his own reasoning.

But whatever other exclusions may be proper, pecuniary interest, the *only* interest of which the human mind is susceptible according to the universally received and generally accredited canons of the common law, is manifestly an improper ground for the rejection of testimony. Pecuniary interests, as before remarked, can hardly be supposed to act in all cases adversely to the truth. Whenever it acts in coincidence with the truth, whenever it is consistent with, and is supported by, the truth, the greater the interest, the stronger the guaranty for veracity. But suppose the only case where there is the least pretence for exclusion, namely, that in which interest acts in a direction adverse to the truth. Still is it preponderantly probable that for this *one* interest all others will be disregarded? The witness testifies under circumstances seen by all, and known to himself to be considered by others as pregnant with suspicion, and exposing his statements to doubt. He knows his statements will be thoroughly canvassed; that in proportion to his interest at stake, will be the watchfulness and suspicion with which they will be received; and with this knowledge of the thoughts of others, falsehood will be seen by him to be, as on all occasions, a path beset with difficulty and danger, so one eminently and peculiarly so in this. Is it, then, so very preponderantly probable that all, rich or poor, with so many motives, loss of reputation, fear of punishment, &c., deterring, will, to promote this one end, and under circumstances so obviously exposing them to suspicion, commit wilful and deliberate perjury, and that for any sum, however small? And that they will be more likely to do this to obtain any sum, however small, than to promote the interests of those with whom they are united by the nearest ties of kindred, or even than to preserve life? In proportion to the extent of the interest, and according to the relative situation of the witness, will be the temptation to swerve from the truth; but be the interest ever so great, it can never be certain that he will so do; while that he will *not* so do, the probability is perpetually increasing with the diminution of the sum. It may render the witness exposed to its action less deserving of belief than one not so situated; it may expose his statements to suspicion; but of the credence to be given, of the deductions to be made from them for this cause, the judge or judges of fact are as competent to form an opinion, as when, for other causes, similar allowances are to be made.

Whenever the testimony of an individual interested, is rejected, that evidence being necessary to a just result, a certain evil, misdecision, is

the inevitable consequence. The evil falls on, and is suffered by the party in the right, and who, by this exclusion, is deprived of what properly belongs to him. Is it on the part of the plaintiff that this evidence is necessary to substantiate his claims? by its exclusion he suffers the only evil that is apprehended, namely, misdecision; the *very* evil, to prevent which, the witness is rejected.

Doubtful as it may justly be considered, whether every interest will lead to perjury, or whether for every interest, every individual will perjure himself, still more doubtful is the only real evil which can result from the admission; namely, that it should be to the prejudice of the party having the right; for if admitted, and the proper credit only be attached to it, no evil whatever follows.

But what is the danger of so disastrous a result? What greater danger of deception is there in this, than in any other case of testimony exposed to suspicion from other causes? It should be ever remembered *that the danger of deception is not as the danger of falsehood*, at any time; still less so when the danger of falsehood is perceived. The more probable it is that any individual will testify falsely, the less likely is it that the falsehood of such individual will deceive. Falsehood is most dangerous when most unexpected. The more obvious the danger of perjury from interest, the less the danger that such interested testimony will prove deceptive. Pecuniary interest, as all see and know, acts with force. All believe this, and take precautions to prevent testimony, coming from such a source, from producing too great an effect on their minds. Fear or enmity, love or hate, or revenge, any of the passions, are infinitely more likely to lead to deception. They may exist and act, and yet their very existence be unperceived. The effect of love or hate is unknown; there is no mode by which their strength can be measured, or the sensibility of any one to their action be ascertained. A cloud covers them, and conceals them from human inspection. We have no index by which to measure the intensity and activity of their power. Of money, its strength as a motive, is, in the same individual, in proportion to its amount; and in different individuals, in proportion to their relative susceptibility to the influence of pecuniary motives. From a million to one dollar, or to one cent, there is an infinity of subdivisions and of pecuniary interests and motives. There is wealth, from any, the greatest, to any, the smallest sum; from that of Crœsus to that of his poorest subject; and the force of the motive arising from the *same* amount, will vary in proportion to the situation and character of the individual exposed to its action. The individual whose income is a million per annum, and he whose life is supported from day to day by begging, will not be equally affected by the motive to save or gain a dollar. The old woman who sells apples at the corner of the streets, knows the difference between two and one, in reference to cents, dollars, or millions of dollars; that two dollars, or two millions of dollars, will be more objects of desire than one dollar or one million of dollars; she knows that the price of half a dozen apples would be regarded differently by herself and by the rich merchant who passes by her; that while the loss of a dollar would be felt by her as a serious matter, the

man of millions would not regard it. All this she knows, and everybody knows, save and except the judge, who considers the motive to save or gain any sum, more or less, a million or one dollar, as having the *same* force on the minds of *all* individuals, from kings to beggars; and that force to be infinite. While pecuniary interest is thus seen, and its force as a motive, and the susceptibility of any individual to its influence may be estimated with very considerable probability, and while most other motives are involved in uncertainty, or shrouded in darkness, is there a good reason for sweeping off, by one indiscriminating rule, all interested witnesses, without any distinction as to the amount of their interest, or its probable influence as a motive? Is the danger so great that with *interest* written legibly in figures on his forehead, the witness would obtain *undue* credit with the judge, who is so acutely sensible of its force, as now to exclude the witness; or with the jury, who themselves know the value of money, and the influence of the motive, and who would be cautioned by the judge, and warned by counsel, of the danger of falsehood? Would there be such magic in the testimony of one thus subject to suspicion, that all would yield to its influence? The judge, the jury, all, see the danger; all know that money has power over the mind. There is no judge or juryman by whom this motive will not be seen as having weight, and who, seeing this, will not be guarded against this evidence. Is there so great danger, then, that they will fall into the error of giving this evidence undue and improper credence? Is there any, the smallest reason to believe that the testimony of an interested witness cannot be weighed and compared, as well, nay, much better, than that affected by the interests of social life? If the testimony of those thus affected, is, and has been admitted without evil, is there any shadow of a reason to anticipate any pernicious consequences from the admission of this? If the judges of the law or of the facts were sufficiently on their guard against deception from this source, there would evidently be no danger from this evidence. Those, who, without hearing or knowing the evidence, have rejected it as *false*, excluding all evidence to disprove this inference of theirs, were clearly *more* than sufficiently on their guard. If, then, watchfulness were substituted for exclusion, and if that watchfulness should be sufficient for the emergency, all the benefit of the admission of the testimony might be obtained without any imminent hazard.

Let, then, the evidence be admitted. If the interested witness, being admitted, is not believed, his testimony has no weight in the cause; it is, in effect, rejected; and the result is the same, in the particular case, as if he had been excluded. Suppose, on the other hand, that the evidence is believed, and is effective for the purpose of affording proof, on which a decision is grounded; then, if it is correctly credited, justice is done, where, without its admission, injustice might have been unavoidable.

If it is asserted that it was improperly credited, the assumption by the person thus alleging, is, that he is a better, surer, safer judge of the truth of testimony he never heard, and of which he knows nothing, than the judge who sees, hears, and examines, and who, after this examination,

after hearing the statements and counter-statements of the parties and their other witnesses, yet believes. It would be equally reasonable for an individual to condemn the decision, to which the judge, after a full and patient hearing of the parties, had arrived, without knowing the nature of the claim, or the evidence by which it is supported, or the reasons on which the judgment was founded, as for him to say and decide that testimony, of which he knows nothing, was erroneously credited by those much better qualified to judge. But so says the law; it prefers a decision in perfect ignorance of the testimony, without a knowledge of any part or portion of it, to one with all the information attainable; and not merely prefers, but considers the decision without light as conclusively right, and presumes the one made with light to be wrong.

The rule, in its original establishment, assumed on the part of the judges who made it, a foreknowledge of the future most wonderful, that there was a preponderant probability that all witnesses, who might be interested, would perjure themselves; and that in all coming time, such would be their own and the imbecility of all future judges, that, to prevent them from erring, the only safe course was to prevent them from hearing. Its continuance by succeeding judges admits the justice of that prescience by which their own imbecility was foreseen and guarded against. In common language the argument ran thus: "A witness so and so situated, will probably lie. I know this perfectly well, have no doubt of it, and I so inform or can inform others; yet knowing this, neither dare hear him, nor permit others to hear him, lest, hearing, they and I should believe his falsehoods. Therefore, I exclude him."

Were this question now for the first time presented for discussion, it might be unnecessary to pursue the subject farther; but supported as the rule is by the prejudices alike of the legal profession and the public; almost sacred as it is rendered by the venerable dust of antiquity which covers it; a more severe and rigid scrutiny of its vague and shadowy distinctions, of its innumerable contradictions and exceptions, seems to be demanded.

1. By the rule now established, any interest, however *minute*, excludes.

Were it stated in some volume of travels, in a rich, flourishing, and intelligent community, that such was the notorious disregard of truth among its inhabitants, that they would all, or rather it was considered preponderantly probable that *all* would, perjure themselves for any the smallest pecuniary interest, and that so notorious was this want of truth, that a rule of law, in anticipation of, and to prevent this supposed perjury, had been made, by which *all* subject to the minutest conceivable pecuniary interest were excluded; that this rule was universal in its application, embracing the rich and the poor, the chief magistrate and the meanest beggar, without the least reference to the character of those so excluded, without even an inquiry respecting it; that this rule had received the sanction of wise and good men of all preceding ages; that it was a part of an elaborate code of laws, which, from their excellence was termed the perfection of human reason; that this was one of the

most important and necessary of those laws; and that on its preservation the whole fabric of society depended;—what opinion would the reader form of the moral character of that community? Would he not suppose, if this rule were well-founded, that perjury and subornation of perjury were the order of the day? Would he not be on the look-out for a *market overt*, in which witnesses, with straws in their shoes, would be ready to sell their testimony; or their agent, the auctioneer, would be knocking off to the highest bidder, in this general mart of mendacity, witnesses for civil and criminal cases, in quantity or quality to suit purchasers; and the attorney standing by, examining, like the purchaser in a slave market, the intellectual qualifications of the witness; his acuteness in giving testimony; whether he was a fresh one, just entering the lists, with a maiden modesty and with untarnished character, or a veteran in judicial contests, with a worn out and ruined reputation, but with hardihood and impudence unrivalled? For, if to avoid the loss of one cent, an individual will perjure himself, it can hardly be imagined that he will have sufficient moral firmness to withstand the bribe of ten cents, the offer of which would be unknown to the public. Whatever opinion might justly be formed of that country, such (if a similar, or rather if the *same* rule be well founded here,) must be his opinion of his own. *Mutato nomine de te fabula narratur.* The grave and solemn logic by which this matchless absurdity, or this profound and enlightened estimate of human character, is supported, can hardly be read without a smile. Starkie,(*e*) one of the best writers on the subject, and who, in addition to the wisdom of our ancestors, has the accumulated arguments of modern times, uses the following language in advocating the propriety of this rule. "Experience proves that *some* exclusion is necessary; but if exclusion of witnesses actually interested, be, in *some* cases, necessary, the law must exclude *all* such witnesses, however trifling the amount of such interest may be; *for* a general rule must be laid down, and it is obviously impossible for the law to define what extent or degree of interest shall incapacitate a witness; and, therefore, it is necessary to exclude *all*, who are so interested to any extent; this is the necessary consequence of recognizing this exclusive principle at all. The law excludes *all* who have an actual interest in the event, however *minute* that interest may be, because it must exclude *all or none.*"

Suppose, (*the very question in issue,*) that "exclusion is necessary," and that the exclusion of witnesses actually interested be "in *some* cases necessary," how follows it that the law should "exclude *all or none?*" The law should exclude only in those cases necessary, and a partial, by no means proves a *total* necessity. If there be any point in which exclusion is unnecessary, why in that case exclude? If any point where it is manifestly absurd, why in that case adhere to the rule? The exclusion should be only co-extensive with the reason of the rule. If, then, in case of a farthing's interest, it is absurd to say, that to promote that interest, every individual will, or that there is a preponderant probability sufficient to warrant the conclusion that *all* will commit perjury for that

(*e*) Vide 1 Starkie, 85.

sum; why, to that extent, for that sum, establish a rule that assumes this fact as its basis, or else it is totally unfounded; for, if no one believes that, for this sum, there is any such probability of perjury; that, from so minute an interest, there is any perceptible danger, then all unite in condemning the rule. If in the case of a penny, a dollar, two dollars, it is absurd and unnecessary, abolish it to that extent. Wherever the rule is unnecessary and useless, or absurd, and so seen and recognized, abolish it.

But a "general rule must be laid down"—and suppose it must, does it follow that it should be laid down so as to embrace cases where its operation is useless and injurious? cases not within its intent, not within the danger contemplated, and to guard against which the rule was established? If the case be not within its spirit, its purview, why, when such is the fact, adhere to the rule? The rule can as well be general at one point as another; but should not assuredly be so general as to embrace cases when it is not needed. A rule may be too general as well as too restricted in its operation, and either evil should be guarded against.

But "it is impossible to define what degree of interest shall incapacitate," and it must exclude all or none. If possible in any case to show the rule unnecessary, to the extent of *such proof*, it is clearly possible to show what shall *not* incapacitate. It is evidently possible, if such be the fact, to say, (and if such be *not* the fact the rule is right,) that one farthing's interest shall not be considered and acted upon as conclusive proof of probable perjury, to the exclusion of testimony. But, if impossible to define—if in any given case, of any given sum, it is impossible to say that it will produce perjury to promote the interests arising from that sum—then the very impossibility of saying with certainty what the law assumes as certain, sufficiently certain to be the foundation of its action, is of itself a sufficient argument against the rule. In one of the States,(*f*) the general estimate of an *average* conscience is one hundred dollars; and however ludicrous it may be to make such estimate, and however difficult it may be to show why that sum should be preferred to one hundred and one dollars, yet establish the rule wherever it may be, *such estimate* is always actually made; and made, under the present rule, at the *lowest* point possible, predicating perjury of all, good or bad, rich or poor, for the smallest subdivision of property. The law now, (*impossible* though it may be) actually defines what interest shall incapacitate; and the question is in truth, whether no better line can be drawn, if a line must be drawn. But, if perjury cannot be considered as probable for any the smallest sum, if it be impossible to fix on *any* sum, then repeal the law, by virtue of which the interested witness is rejected. If there be any given amount for which a witness should be excluded, whenever that amount can be agreed upon as the proper one, then and there establish the exclusion, but not till then and at no other point.

It may not be uninstructive to compare the reasoning by which the

(*f*) A law to that effect, in case of parties, we think we have recently seen; that is, before justices of the peace, one hundred dollars being the extent of their jurisdiction.

admission of the interest arising from the social relations, is justified, with the remarks previously quoted as to the exclusion arising from pecuniary interest. Starkie,(*g*) in defending the propriety of the admission of father and son for each other, says, "What would be the consequence of extending the principle to cases where the witness is influenced by the ties of blood or friendship, or by the relations which subsist in society? *Where is the line to be drawn?* If a father cannot be a witness for a son, must not the same principle exclude the testimony of a brother in favor of a sister? If so, why not that of an uncle in favor of a nephew, of one intimate friend for another? And where is the line of exclusion to be drawn? Would it be *possible* to define the particular degree of influence or bias which would render the witness incompetent? And if that were not, as it is, an *insuperable difficulty*, it would be inconsistent and unreasonable to assign an arbitrary limit not co-extensive with the operation of the principle itself. If all who labor under influence, prejudice, or bias, were excluded, the consequence would be that the rule would be too vague and indefinite to be put in practice. The difficulty arises from the general and extensive nature of human motives and prejudices, which exclude any definite limitation," &c. . . . "And were it to exclude every witness, from kindred, friendship, or any other strong motive by which human nature is influenced, it would exclude *too much* the means of discovering the truth."

In the case of pecuniary interest, the *same* reasoning proved the propriety of a result directly the reverse of this. The same difficulty, that of establishing general rules, in the former case proved the propriety of general *exclusion:* in the latter, of general *admission*. The difficulty of drawing a line was a satisfactory reason why in one case a line should be drawn excluding all, and in the other, admitting all. The evil of depriving courts of evidence,—the indispensable necessity of justice,—the absurdity of assigning arbitrary limits not co-extensive with the rule, were reasons equally for admission and rejection. The premises continuing the same, the reasons the same, the only course was to draw, not the same, but directly opposite conclusions from the same premises. The question to be proved being, not *what is right*, but that *whatever is, is right*, had the rules been changed as in the Roman law, with equal ease, from the same premises, could the apologist of existing institutions have varied his conclusions to accommodate them to a change in the law.

2. The interest must be *certain*, not doubtful or contingent.(*h*)

The son, for instance, is admitted, when the rights of his father are in contestation. Why? Because the interest is contingent. But is every contingent interest valueless? What is a lottery ticket but the present value, too highly estimated it is true, of a contingency,—of the chance of some one of the prizes offered? Would not an only son be as likely to be affected by the interest he has in a case of his father's, in which a million, his father's whole estate, is in issue, as in a case of his own, when but a dollar was pending; and were this right of the son,

(*g*) Vol. i. 85.

(*h*) "But a contingent interest, says Tait, in the issue of a suit created by purchase of the plea would disqualify." Tait's Evidence, 359.

his chance of surviving and inheriting of the father, the subject of sale, would it not be considered as more valuable than the dollar which excludes? Could not this right be sold for some *certain* sum, some amount every body would call certain? And if so, would it not have the same influence as this *certain* sum—its price—on the testimony? throwing out of view the interest of filial affection as being perfectly powerless, too microscopic in its effects to be regarded by the common law. "Contingent!" But is not every thing contingent? What is certainty or uncertainty? Nothing belonging to the respective events of which they are predicated by different individuals; they are predicated of the *same* event, the event itself remaining unchanged and unchangeable: they are mere words, expressive of the belief of the individual uttering them, as to the probability of any given event, about which they are uttered, either as having existed, existing, or about to exist. The interest of the party, what is it but contingent? dependent upon the result of the case, the amount recovered, the solvency of the individual against whom the judgment may be obtained, the value of which would vary accordingly as the different contingencies are regarded by the purchaser of that interest. But of witnesses, there is no one whose interest is not subject to the same contingencies, together with the additional one as to the result of the case he may bring, or be compelled to bring, to recover his right; for the recovery of the judgment by no means puts the money he may have a claim to, into his own pocket.

3. But a *legal* liability is not absolutely necessary.(*i*)

If a witness would testify under the impression of an interest which he honestly believes he has in the event of the suit, although in point of fact he is mistaken, he having no legal interest, he cannot be sworn; he being considered under the same bias as if actually interested. It is obvious, that if, on stating his belief, he was informed by the court that it was erroneous; if he *believed* the judge, his mistaken impressions would be removed, and there would be no pretence for interest interfering. The rule must, therefore, be based on one or the other of these two very remarkable reasons; either it would be considered improper,—extrajudicial,—for the judge to inform him of his mistake and set him right, and, therefore, never knowing his mistake, he would obviously testify under the same bias as if *legally* interested; or else from some cause or other, the general character of judges must be such, that statements coming from that source would not generally receive credence, or

(*i*) Whether the law be as above stated is doubtful. The cases on the point are numerous. On the side of incompetency are Fillingham v. Greenwood, 1 Str. 129; Rex v. Walker, 1 Ford, 145; Trelawney v. Thomas, 1 H. B. 309; Rudd's case, Leach C. C. 154; Richardson's Ex's v. Hunt, 2 Munf. 148; Sentney v. Overton, 4 Bibb, 445; Lansingburgh v. Willard, 8 Johns. 428; Plumb v. Whiting, 4 Mass. 518; Skillings v. Bolt, 1 Conn. 14. On the side of competency are 1 Phil. Ev. 43; 2 Starkie, 747; State v. Clarke, 2 Tyler, 273; Long v. Baillie, 4 Serg. and Rawle, 226; Henry v. Magon, 2 Binney, 497; Miles v. O'Hara, 1 Serg. and Rawle, 36; Moore v. Sheredine, 2 Har. and M'Hen. 453. These cases are quoted from the notes to Phillips and Starkie. This is the certainty of the law on the subject of evidence. Now how should the inquirer govern himself in coming to conclusions, *numero aut pondere?* If by numbers, a child can count; if by weight, *quis judicet ipsos judices?*

would not receive credence in a sufficient number of cases to do away the evil resulting from the evidence of those, who, disbelieving their statements, were, so far as their testimony was concerned, the same as if actually interested; for, if their statements were credited, the witness would know that he was devoid of interest.

If it should be said that the law is misstated on this point, and that a witness, while believing himself actually interested, is still, if under no *legal* interest, admitted, it will only be one more added to the long list of exceptions to the general rule; for, if interest *only* as believed is dangerous, the belief of interest existing and continuing, the witness testifies under precisely the same frame of mind as if his impressions were correct.

4. The subsequent voluntary creation of an interest without the assent of the party by whom he is called, does not exclude.(*k*)

If a witness, either by a wager, or in any other way, become by his own act interested, he is admitted, *because* he shall not be permitted to *deprive* another of the benefit of his testimony. But if the situation of the party deprived of testimony is a matter worthy of consideration—which it does not as yet seem to have been—of what consequence to him is it whether the interest by which he is deprived of testimony were voluntarily or involuntarily acquired? The deprivation of testimony is equally great, in whatever way the interest was acquired, and the loss of the evidence, in either case, is equally injurious to his rights. But let the voluntarily acquiring interest by a wager,(*l*) or in any other way, be as improper as it may, still, if the rejection of testimony from interest is required by a prudent regard to the ends of justice, it is perfectly immaterial when or how it is acquired; it is none the less dangerous because voluntarily created. To warrant the exception, it would be necessary to show the different and greater effects on testimony caused by a dollar's interest involuntarily, and the same voluntarily, acquired. Having voluntarily lost all claims to integrity, there seems no reason why he, more than another, till reinvested with honesty, should be heard; or why, if the rule be right, his testimony, if productive of misdecision and injustice, should be admitted, more than any other evidence subject to the same dangerous bias.

5. Informers.

So little does government think of this supposed danger, that it holds out pecuniary rewards, attainable only in case of the testimony's being credited; that is, on the happening of the very event, to prevent which the evidence is rejected. All men, says the law, will perjure themselves for one cent, or an infinitely small portion of a cent, and govern-

(*k*) 1 Phill. 105, and *seq.* The law was formerly otherwise. The authorities are both ways. Under this head are very curious distinctions. If the wager is made after the happening of the event to which he is called as a witness, it excludes; if before, it does not. Suppose two facts, one *before*, the other *after*, the wager; what would then be the result can only be known *after argument*. 3 Johns. Cas. 237; Root, 406. *Sed quære de hoc.*

(*l*) In the Scotch law, the person thus interested is admitted "because, if such an interest were in every case to disqualify, a witness might create the interest in order to deprive the party of his evidence." Tait on Evidence, 359.

ment proclaims to all, if you will swear enough to convict, you shall receive ten dollars. Strange that government, knowing the truth-destroying effect of interest, will voluntarily infect testimony with any ingredient so deleterious; that, for the purposes of justice, it will invite and suborn perjury, and that too in the very temple of justice.

6. Interest in the record and exceptions.

"A witness is interested, if the record would be the instrument of securing to him some advantage, or of repelling some charge against him, or claim upon him, in some future proceeding.(*k*) It will be unnecessary to examine the case *when* the record is admissible, as it is a matter most thoroughly enveloped in mystery. We shall only remark on some of the cases of interest under this head, about which there is no doubt.

The uniform presumption of law is that of innocence, honesty, integrity. But the ease with which this, like many other rules of law, is trampled under foot, is most strikingly illustrated in cases of interest resulting from the record. "In an action against the master for the negligence of his servant, the servant is not competent to disprove his supposed negligence; for the verdict may be given in evidence in a subsequent action by the master against the servant, as to the quantum of damage, though not as to the fact of the injury."(*l*)

If, in this case, the usual supposition of law were well-founded, that negligence is not to be presumed, the servant, if *not* negligent, has no interest but to tell the truth; and to prevent his admission, the presumptions are that he has been negligent in his master's employ, the very fact contested, and that, to disprove that negligence, he will perjure himself. Both these assumptions are gratuitous.

Contingencies being not susceptible of creating an interest, one would have thought there would have been contingency enough about the matter to have admitted the servant; it being contingent, 1st, whether the supposed injury was done; 2d, if done, whether by the servant; 3d, if so, whether provable in an action against the master; 4th, if proved against the master, whether he would commence an action, and be able to prove the necessary facts against the servant; for, if all these things did not concur, be "the quantum of damages" more or less, of what consequence is it to the servant?

It is to the interest arising from the record in cases like this, that those admitted from necessity, in the course of trade, are exceptions.

Under this head may be classed agents, partners, &c. Upon this ground it is the constant course to admit the servant of a tradesman to prove the delivery of goods, or the payment of money, or that it has been overpaid by the servant, or, in an action against the carrier, the delivery of goods.(*m*)

In these and similar cases, to mere laymen, it would be difficult to discover why the servant should not be admitted. He would evidently

(*k*) 2 Starkie, 747. (*l*) 1 Phil. 45, 6.
(*m*) 2 Starkie, 752. So in the law of Scotland. Tait, 357.

be admitted without hesitancy, were it not for the rule and the presumption previously considered. But, for the purpose of excluding him, the law presumes he has *not* paid the money, delivered the goods, or performed the other duties incumbent on him; and then, *this presumption still subsisting*, he is admitted from necessity. The witness, who pocketed the money or stole the goods, according to the general rule, is admitted to prove what?—that he *so* did? no; but that the goods were delivered to the carrier, and the money paid over; admitted from necessity, as otherwise there would be no one to tell a falsehood to the prejudice of honest men. A strange necessity! to call the presumed rogue for the purpose of depriving innocent men of their property.

Necessity! If interest be so pregnant with danger to the cause of truth, there is no necessity, which can justify the admission of evidence from which falsehood and injustice will probably result, without at the same time justifying falsehood and injustice. Necessary! The veriest child knows that evidence, from the force of which deductions will be made, will never be introduced, except from a necessity more or less cogent; so that if necessity be a sufficient reason for admission, the rule is at an end.

But under the head of interest from the record, there is one case so truly remarkable, that, though hardly belonging to this branch of the subject, it ought not to be passed by without observation.

When the witness would, by the acquittal of another, discharge himself, he is incompetent,(*n*) and therefore one indicted as an accessary cannot be admitted in *favor* of the principal, whose acquittal would secure his own safety. If the supposed principal were innocent, the supposed accessary's testimony, being in his *favor*, would be true; or, if the supposed accessary were innocent, it can hardly be considered probable, that, being innocent, he will commit an equal crime for the chance it may afford of escape from unmerited punishment; or, if both were innocent, such testimony would be true. It is, therefore, made a presumption of law, for the purpose of excluding this testimony, that the supposed principal is guilty, for if innocent, the testimony of the supposed accessary, if true, must be in his favor—that the supposed accessary is guilty, for if innocent, there is no motive for perjury; and, that being both guilty, the accomplice will resort to perjury, an additional crime, to effect his escape. How in this case, it is possible for the innocent prisoner to obtain the evidence of his supposed accessary, it is not easy to perceive. The *inchoate right* of being hanged, the accessary would undoubtedly be willing enough to release. But, besides the difficulty of finding one, who, with the release, would choose to accept its attending liabilities, it seems very doubtful whether the law, though it allows very wonderful things to be done by a release, would permit so great liberties to be taken. If the release was to be given to the accessary, though undoubtedly it would be received with joy, yet, who are to give it but the attorney-general or the hangman. If, then, it should seem that no release would be considered effective for the purpose of procuring his

(*n*) 2 Starkie, 749.

admission; the only forlorn hope, in innocence, seems to be, that the accessary should promise to testify against the principal, and when on the stand violate his promise and tell the truth.

If the testimony of the supposed accessary were against the principal, whether true or false, there would be no qualms about its admission. The very self-convicted partner in guilt, "under an implied promise of pardon, with an equitable title to a recommendation to the king's mercy," is every day admitted to testify *against* the principal. Nay, further, though such testimony were false, *perjurious*, putting in peril the life of an innocent man, it being *for the king*, though perhaps not praiseworthy, it is, at any rate, not indictable.(*o*) To the innocent there is no hope. Truth, if in his favor, is rejected without a hearing. Falsehood, if against him, is admitted, encouraged, rewarded. Of a truth, his hope must be in God; the laws of his country leave him but little.

7. To the instances above enumerated, might be added the numerous ones, in which the testimony of a party is admitted. In chancery, when in case of fraud, resort is had to the supposed knave for the truth; or in case of evidence on affidavit, and the other cases, when the party is admitted to testify. They, however, belong to the subject of evidence in regard to the party.

In all the instances which we have enumerated, witnesses interested have been for centuries admitted, and under circumstances, as pregnant with danger as any in which they are excluded; and yet no evil has ensued. In the exceptions to the general rule, which we have just been considering, it has by no means been our intention to object to the exceptions. The rule being bad, the more exceptions, the more violations there are, the better. But of all these exceptions, no single one can be pointed out, which does not, to its extent, show the absurdity of the rule. They cannot consistently both subsist together; one or the other must fall.

But as witnesses do not come into court stamped with the word *interested;* as their form or appearance affords no indication of that fact, it may not perhaps be considered inexpedient to examine the different tests, by which so dangerous an ingredient is detected, and the witness thereupon branded. To effect this, the court have resorted to two modes; one, by which the evidence is obtained from the witness on his *voir dire;* the other, by which it is derived from other witnesses. But the adoption of either course precludes recourse to the

(*o*) Such is the fact. Perjury *for the king* is not punishable. We cite our authority:—

"He was indicted upon the statute of perjury, because he was produced as a witness for the king upon a trial in an information and sworn: Setting forth the oath and the falsity: *Resolved* by the court, that the witness produced and deposed for the king, might not be punished by way of indictment, which is the suit of the king. For he cannot punish his own witness, who swears for him. Wherefore he was discharged." Croke's Rep. Ab. by Hughes, p. 410. Price's case. Ed. London, 1665. This case has never been overruled, perhaps some would say never ruled, but it is extracted *literatim* from a venerable volume of law. Law is like wine, the older it is, the better is its flavor. This case smacks strongly of age. It may be too old to be good. It is dangerous *vouching* for law

other. Both cannot be employed together. One, unlearned in the law, would suppose that there could be no good reason why all the proof attainable, to one point as well as another, should not be resorted to; nor why, if interest be so dangerous, any species of evidence, by which its existence could be rendered more or less probable, should not be admitted. The reason given in the books is, we believe, that having resorted to the conscience of the individual, you shall be bound. This seems not to be a very intelligible one; for if, having resorted to his conscience, you find he has none, or but an apology for one, why should he be helped to one by a fiction of the law, at the expense of justice, and of one of the parties to the suit?

The test, by an examination on the *voir dire*, is, upon the principle assumed by the advocates of exclusion, a palpable absurdity, a perfect *felo de se*. If, on examination, the witness, in reply to the questions put, says he is interested, he is rejected; if, that he is not interested, he is admitted. The general rule is that from interested testimony, there is a preponderant danger of perjury. Be it so. The witness says I am interested. If this be true, he knows that, by testifying to the truth he will be rejected; and that, being interested, and so stating, he cannot promote those interests for which, if admitted, it is presumed he will perjure himself. If, nevertheless, he testifies truly, by such true testimony he shows integrity when you anticipated total dishonesty; and for so doing the law rejects him. If he says he *is* interested, when he is not so, then, such testimony being false, he is not admitted as a witness. Had the witness, being interested, done what the law supposed he would do *after* admission, testified falsely and denied his interest, then he would have been admitted unhesitatingly; acting uprightly and disappointing expectation, he is rejected "from a supposed want of integrity." You expect perjury when there is interest, and yet resort to the witness from whom you expect perjury, and consider his evidence conclusive. You consider the evidence of an individual, the probable falsehood of whose testimony, without stopping to listen to it, you make a matter of legal presumption, to be true—true to the exclusion of all other evidence on the question of his admission. If he is interested, and yet honest, and states that he is interested, the law considers him to be probably a perjurer, and he is rejected. If being interested, he denies it, thereby perjuring himself, he is admitted.

If, without resorting to the witness, resort be had to his statements *out* of court, besides the strangeness of expecting truth from one whom the law considers as probably a perjurer, there is the additional absurdity of preferring hearsay evidence to direct testimony; of preferring statements without, to those with, the sanction of an oath; statements which may be misrecollected or misreported, and which were made without the proper examination, and which, after all, only prove *past* not *present* interest, in which latter the danger lies. For though interest once existed, it by no means follows that it now exists.

If the declarations of the proposed witness be considered conclusive, still the rule is bad. Suppose he was misunderstood, would there be any evil in correcting that misunderstanding?

But to the men of the law extraordinary things are possible. As by certain magic rites and ceremonies in case of infamy, this infamy is eradicated, and the convicted felon stands forth "regenerated and disenthralled," a *new* creature, with all moral taints and legal disabilities removed, and with a restored and purified reputation; so, too, the law in its wisdom, leaving no evil unprovided for, has established a mode by which integrity may be restored to the witness, who, by some interest, was so unfortunate as to have lost it. It is restored by the sacrifice of the disqualifying discrediting interest. Integrity and interest could not co-exist in the same bosom; they are irreconcilable, and the war between them is unceasing.

This restoration of integrity is effected by a release either *to* or *from* the witness interested. How comes this release? Suppose the witness without any consideration flowing from, or any understanding with, the party, the 'releasee,' should give him a release of all claims to the interest for which he is excluded; the witness deprives himself of, and invests another with rights, unexpected and uncommanded by the law; and to the extent of the interest so released suffers a loss. And does he do this for nothing? without motive? No, not unless you suppose action not merely without, but contrary to motive. There is, then, in this case some motive superior in strength to that of the pecuniary interest on account of which he was rejected, and to promote which he suffers the loss; to the extent of that interest and the action of a correspondent motive he is still exposed to bias. The devisee being a witness to a will, and of course, before the statute took away his interest, interested to establish that will, must, to be admissible, release his interest, or rather the law itself releases it. If, then, releasing without consideration, without being paid the devise, he was thus deprived of the gift intended him by the deviser, to that extent he suffered, and the will of the deviser was frustrated: to do this he must be impelled by some motive superior, though in a degree ever so slight, yet superior, to the pecuniary interest under the will. He was then, to all practical purposes, as to giving testimony, an interested witness. There is no getting rid of this dilemma.

If, to procure this release, any one wishing to establish the validity of the will, should pay the legacy; if the will be established he loses what the deviser never intended he should; if the will be not established, the witness receives what the event shows he was not entitled to, and the person paying, in either event, suffers a loss which the law never imposed on him, and that for the purpose of obtaining a *chance* for justice. [We speak of law as it was applied according to the ordinary rules of evidence, and independently of the statute 25 Geo. II. c. 6, and other statutes annulling the devise or legacy given to one who is a subscribing witness to a will.]

If the release is *bona fide*, there is the evil of obligations being imposed upon, and losses suffered by the wrong individual; if *mala fide*, that is, with an understanding that the parties shall act as if no release had been made, then the interest exists.

But how comes this release? The witness would not deprive himself

of rights to which he had an unquestioned title, and the party would not release the witness from liabilities to which he might be exposed, without some inducement. The party must, in some way or other, have ascertained that the testimony of the witness would be useful to him. The witness must have made statements by which his testimony was seen to be desirable. And having made these extrajudicial statements, is there no motive to adhere to them? Has the witness no interest in his reputation for truth, which, in case of a deviation from these statements, must suffer? The party would never have released the witness, or paid the consideration for which the witness signed his release, without some knowledge of what the testimony of the witness would be, and an understanding express, or implied, that such testimony, when delivered in court, would coincide with the previous statements which led to this contract, and with this understanding and under these circumstances is the disqualification done away?

Without the release, or the happening of a certain event, there would be certain liabilities to be borne by the witness, from which this release exempts him. If the witness says that he intends to avail himself of this release to be thereby exempted from liabilities to which he is legally and equitably subject—if law and equity are coincident—in order to throw a loss on one who should not suffer it, he is heard. But, if being a man of honor,(*p*) he intends, notwithstanding his release, to submit to his previous liabilities, and on being interrogated, so says, then he would not "be suffered to *endanger his integrity* by being examined on the trial."(*q*) If, then, the witness, notwithstanding his release, is willing to act honorably, if he is a man of extraordinary integrity, he must not be heard. Liability, though legally released, will nevertheless exclude one who is disposed to act with integrity, while admission is thus given to him who may be tempted to dishonesty or perjury. It is supposed that the individual who voluntarily assumes obligations, to which by law he is *not* exposed, will commit perjury to escape from obligations which he cannot be compelled to bear. If not intending so to do, but so saying, he can always deprive the party releasing him of the benefit of his testimony; or if intending so to do, that is, to comply with his legal obligations, notwithstanding the release, if he will, merely to accommodate himself to the circumstances and the rules of evidence, perjure himself, and say he does not, there is no objections to the introduction of his testimony.

If, on the other hand, the witness has released his claims to the party, still, if considering him a man of integrity, he expects to receive whatever belongs to him, and that the party will act uprightly, and take no advantage of the release, and so says, he is rejected; if, so expecting,

(*p*) There were formerly strong objections to men of honor in courts, but latterly there have been signs of relenting. 2 Starkie, 746. Contradictory authorities.

(*q*) Per Lord Mansfield. Leach, C. C. 154. So Lord Mansfield states the law, but it has been since more generally considered as overruled. 2 Stark. 746. But the rule as stated by Lord Mansfield, is adopted in Skillinger v. Bolt, 1 Conn. Rep. 147.

he denies the fact, he is admitted. To all honest men, notwithstanding the specific of the release, the doors are absolutely shut; to all dishonest, release or no release, they are thrown wide open.

What then comes of all this shuffling, of these slight-of-hand tricks?(r) Rights are taken from those to whom they belong and given to others; and individuals are exempted from liabilities to which they ought to be subject, that there may be even a chance for justice. And when, after all, the release is operative, the whole effect of it is to cause that to be regarded as without suspicion, which is equally untrustworthy as before, rendering it less likely to be regarded with caution, without rendering it more entitled to credit; increasing the danger and diminishing the security, by lulling watchfulness to sleep.

The rule, then, examined under every aspect, is fraught with nothing but evil, naked, uncompensated evil, without the shadow of good.

Whether the law in all cases examined, has been correctly stated, is uncertain, for the law on this subject is as inconstant and evanescent as the clouds floating above us, and as changeable and unfathomable as the ocean. To go through the detail of conflicting authorities, would be labor without the hope of reward, and tedious without conveying wisdom or instruction. Starkie devotes no less than forty pages to this subject, and makes about six hundred and twenty references, including, perhaps, some repetitions; a good proof of the certainty of this part of the law. When the decision of Bent v. Baker was made, a triumphant shout was raised at the important innovation. Since then legislatures have gone on, at a snail-pace, removing interest with their omnipotence, by a penny at a time; and their co-laborers, the judges, by exception after exception, have partially remedied the defects of the law at the expense of its consistency. Centuries to come, by the co-operation of the judiciary and the legislature, may accomplish, what ought NOW to be done,—admit all, and substitute suspicion and watchfulness for exclusion.

(r) Starkie, vol. 1, 87, in defending the rule by which parents and children, &c., are admitted, among other things, with a simplicity truly enchanting, remarks, that "*partiality* or influence, arising from natural affection, or friendship, does not admit of *a release.*"

We cite two or three decisions as specimens of the law, on the subject of interest.

"The deposition of a witness, who afterwards becomes interested, and is alive at the time of trial, is not admissible." Irwin *v.* Reed, 4 Yeates, 512. Quere, if dead at the time of trial? If the deposition was taken when he was not subject to the action of the interest which is so dangerous, why is it not as good as any other deposition? The fact of subsequent interest will make no alteration, no erasures, in the deposition, nor in any way affect its truth.

"When after a witness has given his testimony, and it is discovered that he is interested, he may still release his interest and be re-examined." City Council v. Hayward, 2 Nott & M'Cord, 308. He *may still release his interest.* Strange! It seems this was doubted, and nothing but a solemn decision could remove such doubts.

"Where a witness interested, has made a deposition, and being afterwards released, is again examined, his evidence is admissible, although the second deposition be the same as the first." 2 Vern. 272. A fact well worthy of being recorded, that a witness is admissible, although he has twice told the same story. The wonder is he was not excluded; probably they would allege that fact, to the *credit* of the witness.

CHAPTER V.

INCOMPETENCY OF PARTIES AS WITNESSES AT COMMON LAW.

THE evils of the various exclusionary rules depend on, and vary in proportion to, the necessity and value of the excluded testimony. In the preceding chapter, an examination of some of the rules of exclusion has been made, but a more important, and if more important a more objectionable case of exclusion, calls for examination. "The law of England,(*a*) . . . to avoid all temptation to perjury, lays it down as an INVARIABLE(*b*) rule that, *nemo testis esse debet in propria causa.*"(*c*) The propriety of this rule we now propose to examine, for however injurious are the other rules of exclusion, this claims the precedence in evil.

As before remarked, misdecision ensues whenever evidence necessary to inform the judge is rejected. Exclude the truth, and he must decide erroneously. If all testimony were shut out, that of parties and witnesses, courts of law might as well be closed. Whenever the testimony of plaintiff or defendant being true and the only evidence by which the claim can be substantiated, is excluded, the extreme of judicial evil is endured. Exclude the evidence of the parties in their own favor, it being the only existing proof, you take from them the means of obtaining, you deny them, justice. Whenever facts within the knowledge of a party, and adverse to his interest, are withheld, injustice, at the expense of the party requiring such testimony, is done. Thus all facts in the knowledge of one or both of the parties, all transactions without witnesses, are acted upon and treated as if not done. A contract being made or fulfilled in the presence of the parties, excluding their evidence, the decision is the reverse of that required by the facts. Unjust claims are wrongfully enforced, or just ones wrongfully avoided. As to whatever is done or said in the presence of witnesses, if misrecollected or mis-stated, the parties are without remedy. No matter how many witnesses, so they only happen to be parties, no matter how important the facts within their knowledge, they are at once shut out. By excluding this testimony, fraud is encouraged, a bounty is offered to the dishonest. Whenever facts are known only to the parties, the honest are placed at

(*a*) 3 Black. 371. (*b*) Invariable, ut lucus a non lucendo.

(*c*) Nullus idoneus testis in re sua intelligitur.—Dig. 22, 4, 10, de testibus. Omnibus in re propria dicendi testimonii facultatem jura submoverunt.—Cod. 4, 20, 10, de testibus. Such is the rule of the civil law, but like the *invariable* rule of the common law, it will be found to be broken in upon by exceptions, some of which will be noticed as we proceed. The similarity of these two systems, on the subject of evidence, is in many respects very striking.

the mercy of the dishonest. Unfounded suits and groundless defences, by refusing to examine and cross-examine the parties, who are conscious of their own knavery, by freeing them from the shame of manifest falsehood, from the danger of detected perjury, are invited and encouraged. Nay, every inducement is held up to view; successful fraud is attended with rewards; unsuccessful knavery is without punishment. The parties, too, are placed at the mercy of any witness introduced by those opposed, whether his misstatements are the results of carelessness or crime. Even if this testimony were not required, still the introduction of the parties would serve for other and important uses. From them might be obtained the ground of the claim or defence, the proofs by which they are respectively substantiated, facts may be admitted, all unnecessary evidence may be avoided, and delay and expense prevented.

But contracts are not entered into with the expectation of subsequent litigation. Besides, witnesses are not provided in advance; and if they should be, from death or any other cause, they may not be attainable, or if attainable, only at a great and disproportionate expense. But a matter *in lite* always implies parties, and those parties at hand. In the other cases of exclusion, the number excluded is small, and their testimony may be only as to few and comparatively unimportant facts. In the case of parties, the number is coextensive with the number of parties, and the importance of the testimony coextensive with the importance of the matter in contestation. The other rules of exclusion may be evaded; the witness, if interested, may be purged of that interest by some of the numerous legal specifics; he may give or take a release;—if convicted, his veracity may be restored by the virtues of his Excellency's seal; if his belief should not happen to square with the legal orthodoxy of the time, he may repent, or, what will answer as well, he may seem to repent, of his belief, and the doors are unhesitatingly opened for admission. In all cases, therefore, where the evidence is of sufficient importance, it can rarely happen that it is not obtained. In the case of the party, even though he be without interest, a mere flesh and blood John Doe or Richard Roe,(*d*) still there is no known way by which his testimony can be received. So far, therefore, as the number of witnesses excluded, so far as the value of the facts within their knowledge, and if in their exclusive knowledge, the utter hopelessness of obtaining them elsewhere may be considered important, so far this may be considered infinitely the most important case of exclusion.

In comparing and weighing testimony when delivered, not merely the character of the witness, but his opportunities for observation, and the motives which might or might not induce him to make the best use of those opportunities, are to be considered. The character of the witness is by no means all that requires attention. Correctness and completeness are the only sure preventives of error, the primary and indispensable requisites of testimony, without which, however great may be the wish,

(*d*) "The party in whose name an action is brought cannot be a witness though he be merely a trustee for some other persons." 1 Phil. 58. The cases, however, are contradictory. Those cited in the notes contradict the text and each other.

there can be but little expectation of justice. If these are wanting, if the testimony be incorrect as to any facts, or if correct as far as it goes, it be incomplete, not embracing all the facts, not affording a full and accurate view of the case, it may, even with the most perfect integrity on the part of the witness, be equally prejudicial, as if the effect of the most perverse and wicked mendacity.

To afford a correct and complete knowledge of facts, it is not enough that they should be stated as they seemed to the witness, but that they should seem to him as they really are. For if owing to want of opportunity for observation, or deficiency of attention, an incorrect or incomplete knowledge of facts should be obtained, the defect of testimony is as great, as if such incorrectness and incompleteness were intentional, the result of determined improbity. To see facts as they exist, and all which exist, and in the order of their existence; to give sufficient attention at the time, so as to render those facts fixed in the memory, that at any subsequent period, when it may become desirable to recall them, the recollection of them may be full, clear and distinct,—is the work of labor, of labor in the perception and recollection; and the more numerous and complicated the facts, the greater the labor, and this labor will never be incurred without an adequate motive. The original impressions may have been clear, distinct, embracing every fact, still from want of inducement to renew, to clothe with freshness past impressions, they may have faded away, without leaving a trace, or only a confused and incorrect reminiscence. In this view of the subject, an absence of interest is *not* the only desideratum in testimony, for the same absence of interest which furnishes security against intentional misrepresentation, affords strong reasons to suppose the witness may have been a careless and indifferent percipient witness of the several facts which form the subject-matter of his testimony. Hence we see how treacherous and mistaken are the recollections of those, who having nothing but their indifference to the result to recommend them, while destitute of interest, are alike destitute of clear perception and accurate recollection, qualities the most desirable.

How then, in these respects, is the party situated? So far as an exact and distinct knowledge of the things done or agreed to be done, of the conversation leading to, and the contract entered into and completed, are of importance, the parties would manifestly be the best witnesses. Interested *each* would be, to the greatest possible extent, to the extent of the contract and the rights thereby acquired; and being so interested, they would obviously be the most attentive observers of the transaction. As great as might be the importance of the contract to each, so much would each feel interested in its consummation, and so far have motives sufficient to induce him to give the attention requisite to a perfect understanding of its language and its import. Each participating in the matter in dispute, in the transaction under investigation, would *best* know his own views and his conduct—better at any rate than others, inasmuch as a man, who has interest enough to make a bargain, would be more likely to know, however unwilling he might be to disclose, its terms, than any unconcerned and careless spectator. The same reasons

which insure attention to the contract to understand its terms, would likewise insure their full and complete recollection. Of his own business, of his own concerns, every one is necessarily regardful; of his own affairs, as they make the most impression, so that impression will the longest endure. Events that but slightly arrest the attention, soon fade away. The more the attention is originally interested, the oftener the facts are recalled; and in proportion to their importance, will be the frequency with which they will be recalled, the more deeply and permanently they will be fixed in the memory. But by no one, to whom they are of little consequence, will this be done. As between indifferent and interested persons, the same acts will be differently regarded; their importance is relative, to the parties of the greatest, to all others of the most trivial consequence. Strange, then, must that logic be considered which would anticipate equal attention from the party who *is*, and from the witness who *is not*, affected by the facts or events which are transpiring. Any other witness, being without motive to regard with care what contracts might have been entered into, being ignorant of the respective views and wishes of the parties, will neither ascertain with accuracy nor preserve with fidelity their several agreements and disagreements, their admissions and denials—what was said and what was done. Of whom, then, would you inquire but of the parties? Each fully and entirely understood, (or if there should happen to have been a misunderstanding,) still they understood the contract better, know more of and concerning it, and would be more likely to remember, than anybody else. Who knows so well, who will remember so accurately?

Were a witness stationed and preappointed to observe, collect, and treasure up the facts in a case, were he paid in proportion to the attention given, to the fidelity of his reminiscences and the truth of his narrations, he would clearly be more likely to perceive, recollect, and relate facts, as they transpired, than any witness, however disinterested. His interest would afford a guaranty for the truth of his statements. He would be the *beau ideal* of testimonial trustworthiness. To a certain extent and for certain purposes, the party is thus interested—affords this guaranty; for important as is the contract to him, so important is it for him fully to understand all its essentials at the time it is entered into, and to treasure them in his memory. *The greater the interest*, the greater the security that all this shall be done. So far, then, interest is evidently favorable to the cause of truth; and were *integrity, in the delivery of the facts known, supposable*, the parties would be the best witnesses. In the absence of all *sinister* interest, none so safe, none so worthy of reliance. Why then reject them? Are all parties under the influence of this sinister interest? The distinctness of their original impressions, the importance of the facts within, and the accuracy of, their knowledge, the vividness of their recollections, and the facility with which they may be obtained, are strong reasons for their introduction, notwithstanding the danger of this influence.

"In the greatest number of civil cases . . the facts at issue must be known to the persons directly implicated, *better than to any others;* but the interest which they have in that issue, the danger of perjury, and

other reasons founded on the strongest views of expediency, render their evidence, in the great majority of cases, highly suspected, and therefore incompetent."(e) From a supposed want of legal integrity, says Gilbert, parties are excluded. Indeed a sort of incongruity has been assumed as existing between the stations of parties and witnesses. The very usage of language, the definition of witness, "an indifferent person to each party sworn to speak the truth, the whole truth, and nothing but the truth,"(f) have sanctioned this supposed incongruity, so that, to most lawyers, the admission of the party to testify would be regarded as a judicial heresy of no ordinary magnitude. We shall endeavor to show, not merely that there is no such incongruity, but that there is the most perfect propriety, in permitting those who are percipient to be narrating witnesses, whatever may be their relation to the cause; that, if the facts "are *better known* to them than to others," however "highly suspected," they should not therefore be considered "incompetent."

The testimony of a party delivered, or which may be required to be delivered, may be divided into two portions, that favorable to and at the instance of, and that adverse to the interests of, the party testifying, and of course called for by the opposing party. Accordingly, as the testimony extracted belongs to one or the other of these divisions, will vary the reasons assigned for exclusion. If the testimony be favorable to and at the instance of the party testifying, a presumed want of integrity, the danger of perjury,(g) the impolicy of trusting juries with such suspicious testimony, are given as reasons for refusing to hear. If the testimony be adverse to the interests of the party, it will never have been introduced by him whose interests are thereby disserved, but will have been called for by the opposing party. In this case the fear of perjury,(h) (if the party should conclude to serve his own interests regardless of truth) if not the hardship of calling a party to charge himself, seem to have been considered satisfactory reasons for each branch of the rule. It may be remarked that the reasons in one, do not apply in the other case: the danger of perjury, the hardship of disserving one's self, do not exist together. The testimony being favorable, however great the danger of perjury, however deceptitious it may be, there can be no hardship in giving it utterance: being adverse, however great may be the hardship, there can be no danger, no well grounded danger, that an individual will knowingly testify falsely to his own injury, and of course no danger that such testimony will lead to deception. Each case, with its several reasons, will receive separate examination and illustration.

When the party, at his own instance,(i) and to aid himself, is introduced, a supposed want of integrity, a danger of perjury is considered a sufficient reason for refusing to hear him. The assumptions are, that the

(e) Glassford on Evidence, 327.
(f) M'Nally on Evidence, 1 vol. p. 1.
(g) 3 Starkie, 1161.
(h) The fear of perjury, and the propriety of oaths, will be subsequently examined.
(i) The rule of the civil law coincides in this respect with the common law. At his own instance no one is heard; but at the instance of his antagonist, any one, as in equity.

interests of the party testifying are adverse to the truth, that to promote such interests he will testify falsely, that such false testimony will be received and acted upon as true, and that misdecision will ensue. In other words, it is assumed that *each* party is in the wrong, that each, being in the wrong, will, to serve himself, testify falsely, and that such false testimony will receive undue credence to the prejudice of the party in the right. For if false testimony should not be delivered, or if delivered, should not receive undue credence, no mischief is done. But by the rule each party, the one in the right as well as the one in the wrong, are excluded as guilty of perjury; and interest, without hearing their statements, has been considered, by judges living centuries past, as conclusive proof of probable perjury.

But what is the probability that all parties will testify falsely? Is the plaintiff right in prosecuting, the defendant is wrong in resisting the claim; if the defence be righteous the claim is unjust. The parties being at issue, both cannot, as to each disputed fact, be in the wrong, and the statements of both will not be untrue. Interest will retain the party in the right in the path of rectitude. So far as truth and justice coincide, so far truth will serve the purposes of the party testifying, and it will always serve his purposes best when his conduct has been upright; to that extent truth may be relied on as certain. If, as often is the case, there be mutual errors, if the testimony of neither should be entirely correct, yet a portion of the evidence may be relied on as true. But as to each disputed fact, in each disputed case, truth being for the advantage of the party in the right, there will always be one witness from whom, as to a part or the whole of the facts, truth may be expected—upon whom reliance may be placed—and another, the party in the wrong, whose statements may be entirely or partially true or false.

The party in the right *will not*, the party in the wrong *may* or *may not* perjure himself; that he will have motives to induce and motives to restrain him, is sufficiently obvious. The strength of the various motives, which influence human conduct, vary in different individuals, and in the same individual at different times and circumstances. In no case, whatever their nature, however sinister their direction, is there any certainty that the testimony delivered will be false? From the existence of interest or any other motive, no sufficient reason for exclusion can be drawn. Interest will act with no more nor greater force on an individual, whether the person thus affected be a witness or party. That is, the one and the same motive, the hope of gaining, or the fear of losing one hundred dollars (and it is the supposed influence of this motive which excludes) will have no other or different influence on testimony, whether the witness be a party or not. The same identical motive operating on the mind of the same individual cannot be perceived as likely to produce any different results from the situation of the individual with reference to the cause. It is still the same amount, still the one hundred dollars. It must be remembered that costs are not to be taken into consideration as increasing the sum: the amount gained or lost is in each case the same. Indeed, when the interest of a witness is one hundred dollars, he is, in fact, to that extent, to that amount, as much a party as if his name were

on the docket. Pride, passion, or revenge, as they do not enter into the reason of the rule, and if they did, might as well exist in the bosom of the *cestui que trust* as of the *trustee*, as well in the bosom of the interested witness as of the interested party, will not now be considered with reference to this subject. In a preceding chapter the propriety of admitting witnesses interested in the event of the suit has been shown, and the same general reasoning, which proves that the interest, the gain or loss of a witness affords no sufficient reason for rejecting his testimony, is equally applicable as proving that the same interest in case of the party should not, on account of its supposed probable falsehood, be esteemed a sufficient reason for exclusion.

The result, then, in the case of parties, is, that a part of the testimony will be true; that each, so far as they are thereby benefited, will testify truly; and, that there is no probability sufficient to justify exclusion, that either will testify untruly. The truth then is rejected lest falsehood should deceive. Who suffers? Not the party in the wrong—exclusion serves his turn, renders his success sure. For whose benefit was the rule established? Of the honest man? Admission is his only hope; exclude his testimony, it being the only proof existing, and wrong decision is unavoidable. Hearing all, the worst that can happen is misdecision; by excluding, that event, otherwise more or less probable, is rendered certain.

But is misdecision so very probable? Let us examine the matter. If the parties being admitted should coincide either entirely or substantially in their statements, the cause is at an end—justice is done. If, as to a portion of the facts, they should agree, there is so much evidence about which there can be no dispute, so many facts established on the safest and surest basis. It is only in case of contradictory statements that any question, any difficulty as to correct decision can arise. It may be said, that of two contradictory statements, it will be impossible to ascertain which may be correct; and that, therefore, both should be excluded. Such seems the only conceivable objection. If, says the exclusionist, the parties contradict each other, what, in the absence of all other proof, is to be done? Done? What does a father when two children tell him contradictory stories about their several grievances? Does he not hear, examine, and compare their respective statements, and then judge; or does he stop up his ears, turn them both out of the room, and then decide as he may? There is no greater danger of deciding erroneously in this than in any other case, when similar contradictions are uttered by persons occupying the position of witnesses. If in one case the judge is competent to decide, he is equally so in the other; if not competent, the argument is much stronger for the removal of the judge than for the exclusion of the testimony. To decide right, when right decision is unavoidable, deserves little praise; it is only in cases of contradiction and doubt that the services of the judge(*k*) are required; and there it seems he fails.

Further, it may be urged, that a bad man will have unequal chance

(*k*) Judges of fact, are generally intended, whatever may be their designation.

with the good man; that the dishonest will commit perjuries, his perjuries be credited, while truth will be disregarded. True, such may be the result, and what then? Is it not better that the honest should have an *equal* chance of success? Is it not better that they should have *some* hope, than that their failure should be rendered sure? Bad men as witnesses, may, when their testimony is false, receive credence, trustworthy witnesses may be disbelieved; and should all testimony therefore be excluded? But has falsehood this advantage, (for even equality is an advantage,) is it more likely to be credited than the truth? The liar is always in danger, from within and from without, from his own assertions, from unexpected questions, from opposing statements. Every true fact uttered by any witness, any true or any false statement of his own, may lead to his detection and overthrow. Truth, consistent with itself, consistent with every true fact in the case, will receive support and corroboration from every quarter. If there be a single true fact, with which the statements of his opponent are inconsistent, such statements are necessarily false. Every truth uttered by himself or any other witness—every truth in the case—by its inconsistency with such falsely asserted facts, increases the probability of the triumph of integrity. Is then the chance of success equal? And even if it were, what would be thought of the judge, who should exclude all contradictory statements, all evidence, lest after hearing, he might be puzzled how to decide. False testimony, when heard, may be credited; but it is hardly worth the while, by excluding true, to make special provision, that injustice shall always be crowned with success.

Indeed in some respects the usual motives to truth act in case of the party with increased force. The situation of the party being dangerous to any extent supposable—the more dangerous it should be considered, the more watchful the public, the more scrutinizing the judge; and all this being known to the party, standing as he does a suspected witness, on his good behavior, seeing every eye upon him, knowing, that if his testimony be untrue, contradictions and refutations may spring up from he knows not where; has he not greater motives to be correct in his testimony, to be on his guard to preserve his character, than any other witness? With so many motives to restrain, with this suspicion attached to his testimony, and the little chance it will produce the results desired, would he not perceive the prospect of successful falsehood to be too slight to justify the risk incurred? In case of falsehood in the testimony of extraneous witnesses, however strong may be the desire, the knowledge to detect and disprove these false assertions may not exist. The evidence of interested witnesses may be all on one side, unopposed by counter testimony. In case of the party, if there be falsehood, such counter testimony of the opposing party will always have the advantage possessed by truth. The plaintiff will always be met by countervailing zeal and countervailing interest. If he exaggerates, the defendant has the best means and the strongest inducements to detect and point out these exaggerations, the testimony of each being seen and examined by the other, the parties being mutually interrogated and cross-interrogated; knowing too, that their statements are made before one with the requisite know-

ledge and with adequate motive to disprove what may be untrue; there is, even if the *most* danger of falsehood, the *best* opportunity for detection.

In case the contradictions exist between the party and extraneous witnesses, still less is the danger of deception from the testimony of the party. The interest of the party is obvious—brought home to the notice of the most unobservant; and the more probable the judge thinks it is, that the party would perjure himself—the more fully convinced he is that parties are *ex officio* liars—the less would seem to be the danger that too implicit reliance would be placed on such testimony. The *real* danger would rather seem to be, that such suspicious testimony would not receive sufficient attention. To the witnesses, their situation lulls watchfulness and suspicion asleep; when all around presents the appearance of perfect security, the pilot is not on the watch for danger. Of this testimony, being so much more than enough suspicious, so much so that he does not hear it, it would hardly be expected, that he would as soon as he should hear it, fall into the opposite error of believing without any investigation.

So far, then, as regards the only case where there is danger of falsehood, the testimony being favorable to the party delivering it, there is no preponderant probability that such testimony will be false, or if false, that it will receive undue credence. Let it then be delivered; as for *pure* testimony, it can never be foreknown nor obtained with certainty; and as for waiting for it, as well might the countryman wait on the banks of the river for the ever-flowing stream to cease its course, that he might pass over on the sand which its waves had covered.

So stands the argument when the party is introduced at his own instance, and to support his own claim. Suppose the testimony of a party adverse to his own interest is required. The reasons for exclusion are different. Here the testimony of the party will be true or believed to be true, there is no fear of intentional deception, no danger of perjury, for if there be any thing which may be considered as undeniably true, true to the exclusion of even the possibility of doubt, it is, that no sane man, whatever may be the subject matter of his testimony, will testify falsely to his own injury, not merely without, but against motive.

The question, then, is, whether, at the instance of his opponent, a party shall be subject to examination for the purpose and with the intention of eliciting facts adverse to the interest of the party called. No,(*l*) says the common law. A man is not bound to give evidence against himself—it would be hard—he would perjure himself.

The evidence in all these cases is called for by the opposing party. That a party will, at his own instance, introduce evidence prejudical to himself, is not a danger that requires guarding against. A party shall not be asked, and is not bound to answer questions,(*m*) which may dis-

(*l*) "As a party is not *suffered* to be a witness in support of his own interest; so he is never *compelled* in courts of law to give evidence for the opposite party against himself." 1 Phil. Ev. 61. "A rule founded on the ground of policy in preventing perjury, and a consideration of the *hardship* of calling a party to charge himself." 3 Starkie, 106 and note.

(*m*) "The plaintiff . . . who declines answering a question properly put; or

serve his own interests. He shall not be asked—but what he would have answered can never be foreknown. If his answers are in his own favor, all hardship vanishes, and the danger of deception, which in that event is the only objection, has already been considered. If his answers are against his own interest, then the supposed hardship occurs. But what is this hardship which has been adjudged sufficient to excuse the party from testifying? In all cases the delivering of testimony is attended with some more or less inconvenience and hardship; and this hardship can only avail as a valid excuse for the non-delivery of testimony, when it arises from the expense, delay, and trouble, which the party must suffer in obtaining and producing it. But here the hardship is of a totally different character and arises from giving due efficiency to the laws, the very thing of all others desirable. Assuming the answer to be against the interest of the party and for that cause exempting him from examination, is assuming the party to be *in the wrong* and establishing a rule, which enables him to triumph in injustice; to shield himself from doing right; to avow his dishonesty as a reason, why he should claim and receive this protection of the law. The answer being against his own interest is the strongest and most convincing proof of its truth—proof about which, there can be no more question, than that action, mental or physical, is in the direction of and caused by the forces impelling. So that this testimony unquestionably stands free from the least shadow of suspicion. Of testimony favorable to the party testifying, notwithstanding the objections urged, we have seen that a due regard to the ends of justice require its admission—much more so here, when no possible evil can arise. From whom and in what shape will the objection arise. From the judge? If his intentions are pure, why should he refuse to hear, what if heard, will aid and instruct, but what at any rate will not deceive. If testimony of unquestionable trustworthiness is desirable, he cannot object. Condemned by his own admissions, out of his own mouth condemned, the party cannot complain. The judge may fear that the testimony may not be thus adverse; but if the one most interested is willing, on him be the risk, on him the peril. Even if it should be favorable, he, who anticipates perjury, must thank his own folly, if deceived. But with truth, which is *assumed* whenever the hardship is given as a reason for the answer, with safer grounds of reliance than any reported confessions or admissions, the judge cannot but decide correctly; and this can never be considered by him as unpleasing or unsatisfactory.(*n*)

who departs from court; or who being ordered to speak, stands mute; . . . such a plaintiff shall fail in his suit." Institutes of Menu, c. 8, §§ 54, 55, 56.

(*n*) In the civil law adverse interrogation, or what we should call examination and cross-examination, at the instance of either party, was not allowed. But either party might resort to the decisory oath of the party; the party to whom the oath was deferred might either take it or refer it to the party offering it. If taken, the facts asserted were considered as conclusively established thereby. If neither taken nor referred, it was considered as tantamount to a confession of the injustice of the claim of the party thus refusing. In certain cases the judge deferred the oath to either party, when the proof seemed not sufficient to warrant a decision.

In certain cases, too, the party was examined, after obtaining an order from the

If the objections arise from the party, what form will they take? If his answers are favorable, he of course will have no objections to state what may aid, but cannot injure his cause. It is only when in the wrong that this reluctance to testify arises, and it is for the benefit of those thus reluctant that this rule exists. Bad indeed must be *his* case if, when presented in the best aspect, when coming from the favorable lips of the party, it will not endure the light. This reluctance is but a reluctance to do right, a fear that the testimony delivered may lead to, what of all things he dreads, correct decision. The worse the case the greater the reluctance. The reason given for not testifying is the very one of all others why he should be compelled to testify; this very unwillingness is an admission(*o*) of the turpitude of his conduct, and past misconduct is no very good reason for present or future misconduct. He fears that if he testify, justice will be done, the hardship of correct decision will be endured, and hence his desire to be excused; the judge, imbued with similar fears, consents. The *hardship* of correct decision is equally great, whether the testimony which leads to such results comes from the mouth of the party or of any one else; and if the hardship of being compelled to obey the laws is a sufficient reason for excusing him, it is equally so for the rejection of all evidence; and as the actual imposition and endurance of the burden is greater than any hardship in giving utterance to testimony, which might lead to such results, the reasoning, if valid, shows that *no* burdens should be imposed, that no laws should exist. Extraneous witnesses are compelled to answer, notwithstanding the hardship, though by such answers they charge themselves in a civil suit. But is it less of a hardship for a witness to lose than any one else? Will such loss be borne, with more philosophy, because he happens to be a witness instead of being a party? He loves his property equally as well as if he held the more prominent station of party; and well might he wonder at the consistency of those rules, which, as a witness, require of him truth to the loss of his cause, but which, when a party, releases him from such obligations. The term *witness*, by which in one case he is designated, will hardly remunerate him for his loss; yet that is all he has, in that alone consists the difference in the hardship of the two cases.(*p*) If then, in case of witnesses, this presumed

judge for that purpose, on interrogatories; and these interrogatories are put, in order to derive some proof from the admissions the party may make, or from contradictions into which he may fall—*aut confitendo aut mentiendo se oneret.* As to the extent and effect of such interrogatories, see Dig. 11, 1, *de interrogationibus in jure faciendis et interrogatoriis actionibus.*

(*o*) Manifestæ turpitudinis et confessionis est, nolle nec jurare nec jusjurandum referre. Dig. 12, 2, 38. Such is the obvious principle of common sense. To inquire, at common law, they refuse, and of course are without this peculiarly forcible proof of improbity.

(*p*) The rule as to witnesses, who are not parties, is involved in doubt. Much in the way of authority may be adduced on each side. In the impeachment of Lord Melville, the twelve judges, after consultation, differed in their conclusions. Eight considered the witness was bound to answer notwithstanding such answers might charge him in a civil suit. Four of the judges, among whom was the Ch. Jus. of C. P., Mansfield, dissented. The chances may be in the ratio of the number of judges. In England, the legislature, aware of the fluctuation incident to all things human, and particularly to judicial opinions, have established the law in

hardship is no sufficient reason for excusing the witness, it is none for excusing the party. Were the party to address the judge on this subject, it would be something in this strain: "I have done wrong. I have defrauded this individual and am unwilling to afford him any recompense. Indeed to do so would be very *hard*. If compelled to answer, so unwilling am I to do right, that for the purpose of escaping obligations, which the law imposes on me, I may commit perjury; at any rate, I shall be under strong temptation to do so; and it is certainly better to permit me to *wrong* him, than by requiring my testimony, to induce me to commit perjury and thus *wrong* myself. If I should not commit perjury;(q) if I should state the truth, I am then compelled to *endure* justice, to conform to and bear the burdens of the law, compelled to perform my contracts, a *hardship* of all others I wish to avoid. All undue advantages I wish to retain, from all just obligations I wish to escape. In fine, I neither am nor wish to be an honest man, and if I should answer truly, *pro hac vice*, I shall at any rate be one by compulsion; therefore excuse me, I pray you. Had my conduct been upright I should not have been thus reluctant." The judge, duly sensible of the delicacy of his situation, commiserating the melancholy dilemma in which the party is placed, forgetful that whatever hardship there may be in compensating for injuries done or contracts broken, it is of the parties' voluntary creation, upon hearing these reasons duly assigned, excuses him.

It is a rule of the common law that no man shall take advantage of his own wrong; but here the party urges his own admitted wrong as a reason why he should be exempted from doing right, or rather from testifying what may lead to his being compelled to do right. What would be thought of such a plea in bar to an action, a plea acknowledging the truth of the several averments in the plaintiff's writ, a plea admitting the existence and violation of the several contracts specified, and giving the *hardship* of affording remuneration as a good and valid reason why it should not be done? What would be thought of such a reason for not admitting any testimony which might lead to the enforcement of any duty imposed by the laws? The judge, who for this cause should excuse the party, if consistent, could hardly fail to decide the total absence of all right on the part of the plaintiff, as a valid and sufficient reason for his recovering his claims. Unwillingness to testify, lest such testimony should lead to correct decision, considered as a sufficient excuse for not testifying? Unwillingness to receive justice at the hands of the judge, a reason why it should not be administered! and recognized by judges as a good reason! What are the objects of courts but to compel the *unwilling;* the willing need not compulsion.

What seems never to have occurred, or, if it occurred, seems to have been thought of too trifling importance to deserve notice, is the still

conformity with the opinion of the majority of the judges. In this country, the law is uncertain—decisions both ways.

(q) Ait prætor, eum a quo jusjurandum petitur, *solvere* aut *jurare cogam:* alterum itaque eligat reus; aut solvat, aut juret; si non jurat, solvere cogendus erit a prætore. Dig. 12, 2, 34, 6. The prætor seems not to have been afflicted with this squeamish and sickly delicacy. Still the rule of the prætor might be improved; but at any rate it is better than common law.

greater hardship, which this rule imposes on honest plaintiffs or defendants by depriving them of, or rather withholding from them, the means of obtaining their rights. The sufferings they may endure seem never to have entered into the conception of these dealers out of what passes for justice, or if noticed, were only noticed to be disregarded. The great hardship of receiving justice, a regard for the dishonest, that they should be abundantly, and more than abundantly protected, that they should be supported in their iniquities, are visible throughout the whole. No care is taken of the interests of the honest, who thus suffer. Let it be remembered, that in no event does the honest man suffer by admission in this case, whatever may be the answers: if true, he certainly does not; if false, he is only where he was when he commenced, without the evidence which he wished and hoped to obtain. Whatever be the answers, he incurs no risk from the examination. The individual in the right, for whom the rule ought to be established, is not aided by it. The claim of the plaintiff being unjust and known to be so, as in attempting to enforce the collection of a note already paid, the only hope of the defendant (he being excluded as a witness) is in resorting to the plaintiff in the expectation of eliciting the truth from him. If the answers are true, justice is done. The only chance for justice is in thus resorting to him. If the answers be false, if the plaintiff, being questioned, denies the payment, even then the defendant is none the worse for the question. The rule, therefore, cannot, in any conceivable combination of circumstances, have been established for the purposes of justice. The honest alone are prejudiced, the dishonest alone are benefited by its existence and continuance. Had the law been passed at the request and solicitation, and for the special benefit of knaves, they would hardly have wished for more than to be entirely exempt from all personal examination as to their conduct. That the honest should suffer, was viewed as unimportant; that the dishonest should not merely not be exposed to any hardship, but that they should be sedulously preserved safe from what to them might be imagined a hardship, the doing or receiving justice, was the object carefully and anxiously kept in view, and for such purposes no better means could have been devised. To have subjected the parties to examination might have led to impertinent and unpleasant inquiries, might have exposed the dishonest to some danger, might have rendered the chance of justice better, and therefore it must not be permitted.

In any or in all these cases, the judge meanwhile preserves a most stoical indifference to the result. If the parties wish to inform, he refuses their information: if either seeks it through his means from his opponent, he seeks in vain. As for the judge, afraid they will lie, or they will be unwilling to answer his questions, he therefore makes no inquiries. Of the evidence adduced, he makes selections to suit himself; to increase that mass by seeking information is what he never attempts. In Scotland "it is competent for a court of justice to examine the parties to a lawsuit upon the matter of it, not being upon oath, and to put all questions to them which may serve to inform the mind of the

judge."(r) At common law, from a spirit of indifference, they carefully abstain from all inquiries, lest by any means instruction should be received.

The rule having been examined, it remains to ascertain if it is without exception, and if not, to inquire how those exceptions consist with the rule.

The first exception to the rule will be found in the initiatory and succeeding parts of a suit, as writs, pleas, &c. Important as it is that justice should be done in the final decision of a cause, it can hardly be considered as unimportant that every individual should be secured, as far as practicable, from being compelled to answer unjust claims; and if so, it is obvious that every security, that in any case is effective, should be adopted to ensure such result. Desirable as truth may be on the final trial, equally desirable is it at the commencement of suits. Unfounded suits and unjust defences differ only in degree. The expences imposed by the plaintiff on the defendant are equally onerous, whether he loses any given sum by an unjust decision, or in resisting an unfounded claim.

Any one acquainted with the practice of the law knows, that, in the commencement of a suit, whether at common law or in equity, whether by writ or by bill, there are not merely *no* securities for truth, but that an unlimited license to falsehood is not only permitted, but even compelled. The plaintiff, in his writ, or the defendant in his plea, may wander unchecked and unquestioned over the whole region of fictitious claims or imaginary defences; the one may charge all supposable violations of right, the other may offer all conceivable excuses for wrong. True, these are called *allegations;* but do they not answer the purpose of evidence, and that the most conclusive? The allegations in the writ, without any inquiry whether true or false, without any security against vexatious litigation, save the nominal security of inadequate cost against an irresponsible plaintiff, are deemed sufficient to compel the defendant, under pain of having each and every allegation taken as proved, to answer at his own expense, to any complaints, however groundless. Sufficient evidence are the writ and the allegations therein contained, to authorize, nay, to require the arrest and confinement in prison, with felons, in the lowest abodes of human suffering, any number of individuals, however honest and respectable; or to justify the seizure and temporary confiscation of all the real and personal property of the most wealthy; and this, without regarding the inconvenience and derangement of business consequent upon these proceedings, is done on the mere assertion of any individual, the most worthless in the community, he knowing and boasting, perhaps, that his claim is entirely unfounded.(s) On the part of the defendant, he may, when without

(r) Glassford, 331. In the civil law the judge may defer the oath to either, in case of a deficiency of proof, and this is termed the suppletory oath. Where, and to whom, and for what purposes, it shall be delivered, depends on the discretion of the judge.

(s) These remarks refer to attachments on mesne process, which are allowed in New England.

defence, by a special plea, of the falsehood of which he is well aware, put the plaintiff to any amount of trouble, expense and delay, in preparing to prove, or in proving facts, which the defendant knows to exist, and which he will not deny when proof is adduced. The mere allegations of the plaintiff or defendant, uncorroborated by other proof, unsupported by oath, without the least inquiry or thoughts of inquiry to ascertain their truth, are deemed sufficient evidence for these purposes. If these allegations *are* evidence, then are mere statements of the party in his own case for his own benefit, considered sufficient to render proper, measures so detrimental to the adverse party: If *not* evidence, then it follows, that the law authorizes all these proceedings; authorizes the actual infliction of a greater punishment than is suffered in many felonies, without any proof whatever; the same law that presumes all men innocent, and that will not suffer the greatest criminal to be harmed, even as to the amount of a hair of his head, without preliminary proof upon oath.

Now he, whose word is sufficient, without any security, to impose an unlimited amount of trouble, expense and vexation, upon an indefinite number of individuals, one would suppose might be heard on the final trial. Trustworthy to the imposition of burdens however expensive, credited to lay the foundation of suits innumerable, with or without cause, at his own option; when the question arises as to the justice of these suits, he who thus imposes, and he upon whom burdens are thus imposed, are alike excluded. The plaintiff, who is permitted without any security to commence and prosecute his claim, is not heard on the final trial to establish the claim of a farthing's value, even under the pains and penalties of perjury, and with all the checks of cross-examination,—is not suffered to prove one of the ten thousand allegations, which he may assert without any sanctions, and by his mere uncorroborated naked assertion, compel the defendant to answer and contest. A strange credence for one purpose, and a strange distrust for every other. Is the oath of the individual, whose word is conclusive for so important purposes, absolutely without credit? While truth is thought so desirable, it seems strange that measures were not adopted, by which its existence might, at any rate, be rendered more probable. False testimony in the trial of a cause is punished. Truth being desirable in this case, ways and means are taken to procure it. In writs and pleas had truth, veracity, *bona fides* been viewed as important, the proof would have been, in adopting the requisite means to enforce their existence; and such means not being adopted, no inconsiderable evidence is furnished that such virtues were not considered necessary. The assertions of the plaintiff and defendant not being evidence in the trial, though for every other purpose conclusive, and the security of an oath, and the punishment of perjury being withdrawn, falsehood is not merely without punishment, but is encouraged and perhaps rewarded.

Nor have the rules on this subject even the merit of consistency. In writs, no oath, no security for veracity is required; in pleas of a certain description, affidavits of their truth are required, and from whom? The party himself. But if there be any necessity of guarding against delay,

is there not an equal propriety in guarding against unfounded prosecutions? In equity, the bill not being under oath, full liberty is given to the vivid imagination of the draftsman to roam over the whole region of conceivable fraud. The defendant, poor ill-used defendant, being compelled to answer under oath, is at once deprived of the privilege of unlimited falsehood. But true bills are just as important as true answers—honesty as desirable on the part of the plaintiff as of the defendant. Nor is this all, occasionally requiring honest plaintiffs in equity, occasionally wishing to protect defendants against unfounded prosecutions, they exact, as in bills for a discovery, the security of his oath; without which they refuse to hear him.(*t*)

Continuances.

Assertion on the part of the plaintiff being sufficient to give commencement to a suit; the suit being commenced, a continuance on account of the absence of a material witness is claimed. The interest in procuring this continuance is no other than the interest in the final result. The continuance is desirable, only because it benefits, to a certain extent, the party asking, and prejudices proportionally the party opposing, the continuance. Were the plaintiff not to gain by the presence of the absent testimony, he would have no wish to procure it; it is only, as it is necessary and important with reference to the ultimate decision, that it is desired. If the testimony of the absent witness is that on which the case depends, the interest in the continuance and in the cause is one and the same. And by whatever motives, he would, on the final trial be influenced, by the same motives, he would be induced to obtain his continuance. The same reason to expect perjury, the same reason for exclusion in one case as in the other. Yet the party is admitted to testify, thereby to obtain the continuance.

But if admitted, it would be supposed that every precaution to prevent falsehood, every security for trustworthiness would be adopted, every opportunity of contesting the facts stated be afforded, lest it should so happen that a continuance should be improperly granted. Not so says the law. The individual, who, before a jury under every security, which examination and cross-examination afford, and whose statements may be contradicted from every quarter, from a presumed want of integrity is excluded, is still, in the same case, unexamined and unquestioned even though he be in court, permitted to testify to those facts on account of which he desires a continuance, and such testimony, thus delivered at his own instance, is rendered conclusive;—is not permitted to be denied or disproved.

(*t*) Actor quidem jurat, *non calumniandi animo se litem movisse; sed æstimando se bonam causam habere.*

Reus autem non aliter suis allegationibus utatur, nisi prius et ipse juraverit, *quod putans se bona instantia uti ad reluctandum pervenerit.* Cod. 2, 59, 2.

Such was the oath of calumny, which required the party to swear that he believes the facts constituting the claim or defence are true; and that such claim or defence is well founded. This however is now disused in most countries where the civil law is in vogue. It would seem, from Glassford, to be still retained in Scotland.

Somewhat analogous to the Roman procedure, are the affidavits of defence.

By the rules of court(*u*) the party, in his affidavit, must state, among other matters, the name(*v*) of the witness and "the particular facts" he is expected to prove, and the grounds of such expectation. The witness is wanted only for and on account of the particular facts he is expected to prove, and the supposed existence of such proof affords the only reason why the continuance should be granted. If these "particular facts" do not exist, or, if existing, there be no reason to believe the witness will prove them, no matter whether due, or more or less than due diligence has been used to procure his attendance, the motion for continuance should not be allowed. What is the rule? The "particular facts" the witness is expected to prove, are stated in the affidavit of the party desiring delay, "and no counter affidavit shall be admitted to contradict the statement of what the absent witness is expected to prove." "Any other facts," such other facts being comparatively unimportant, may be proved by the party opposing the continuance. The party claiming a continuance gives as the reason the particular facts to which he expects the witness will testify, and the ground of such expectation. The question, which ought to be presented to the court for consideration, is, whether there be reasonable grounds to believe the witness will swear according to the statement of his supposed testimony. "What the absent witness will prove," affords the only reason for delay; whether he will really prove what it is stated he will, is rendered probable only by evidence; that is, the grounds of expectation stated and set forth in the affidavit. If no grounds, or no reasonable grounds, are shown, that such testimony will be delivered, no reason appears for delay. If false grounds of expectation are stated, it does not better the matter. Now it so happens, that, as to this, as to every question, there are two sides; and while there may be grounds of expectation, that such testimony will, there may be still stronger grounds of expectation, that such testimony will not, be delivered. The supposed probable testimony of the witness is as much susceptible of *disproof* as of proof; it is as much a matter of proof, that he will make one set of statements, as that he will make another. Now, if such supposed testimony would not be uttered by the witness, or if, upon hearing all the evidence, it should seem probable, sufficiently so for the action of the court, that such statement of "what the absent witness will prove" is false, that he will prove no such thing, then no continuance should be granted. Excluding all counter testimony, decision as to *that fact*, the only material one in the affidavit, is made upon the *ex parte*, uncontradictable statements of the individual interested in obtaining delay. Strong as may be the probability that such testimony may be given, still stronger may be the probability that such statements will not be made. Defendants, to any

(*u*) 16 Mass. 374. The rules in Maine and Massachusetts are the same. 1 Greenl. 488.

(*v*) It was decided in Smith v. Dobson, 2 Dow. & Ry. 420, that the affidavit to postpone a trial need not state the *name* of the witness suggested to be material and necessary.

In McKenzie v. Hudson, 1 Dow. & Ry. 159, it was held, upon an affidavit to postpone a trial, to procure certain documents, that the court would not try the question of the admissibility of the evidence, to obtain which delay was sought.

number, may state, that the witness will not utter such testimony as the plaintiff on his part has alleged, and they may show to the court conclusively strong reasons for such belief, but they are not heard. When such continuance is granted, the evidence being untrue, the witness not stating such facts, additional delay and expense is without any cause imposed on the suffering party. Why then admit evidence to prove certain facts, and reject it when offered to disprove these facts? If what "the witness will prove" is a matter of controversy, why not permit it to be denied; why not suffer the judge to hear all that may be known on the subject? Why treat as conclusive, evidence so suspicious, that in the final trial it is not even permitted to be heard; conclusive as to facts, as important on the hearing of the motion before the court, as the motion is important in reference to the suit.

Loss of deeds and papers proved by the party.

By a well known rule of law, "the best evidence of which the nature of the thing is capable, is required."(*w*) No evidence, which supposes the existence of evidence of a higher nature, is admissible. Thus, the copy of a deed, implying, as it does, the existence of an original, which would, if introduced, be better evidence, is admissible only on proof of the loss, &c., of the original. As to all "material and traversable facts," on which the jury may be called upon to decide, the evidence of the party is not allowed: is it sufficient, in the case supposed, to prove the loss of the deed or other paper? Unless the loss(*x*) be first proved, such secondary evidence is not admissible, and if not admitted, the party requiring such evidence loses his case. The fact of the loss is often solely and exclusively in the knowledge of the party in whose possession it was, and he being inadmissible, proof from other quarters is unattainable. If, then, this avenue be closed, all access to the temple of Justice is denied. Is the party then admissible to prove such loss? In some States(*y*) the court, being consistent at the expense of justice, exclude him; but as the weight of authority establishes the admissibility of the party for these purposes, the reasoning by which this *apparent* is shown not to be a *real* exception, remains to be noticed.

To show the consistency of this exception with the general principle, a distinction is taken between "*preliminary questions*" and "material and traversable facts." As to the latter class of facts, the rule is rigidly enforced. In the other case, the party is admitted to make affidavit, "which," says the court, "seems to be proper enough; for it is not ad-

(*w*) 1 Phil. 176.

(*x*) The plaintiff is a competent witness to prove notice to produce a deed. Jordan v. Cooper, 3 S. & R. 564; and to prove its loss. Snyder v. Wolfrey, 8 S. & R. 328.

(*y*) It has been decided in Connecticut that the loss or destruction of a deed was not a *preliminary* question but a *material and traversable fact*, to which a party was incompetent to testify. 4 Day, 388. Coleman v. Wolcot; 7 Day, 304, Mather v. Goddard. In S. C. Sims v. Sims, 2 Rep. Cir. Ct. 225. In Virginia, New York, North Carolina, Pennsylvania, Massachusetts and Maine, and in the Supreme Court of the United States, the decisions are the other way; the party is admitted to prove loss, &c. Givens v. Mars, 6 Munf. 201; Jackson v. Frier, 16 Johns. 193; Garland v. Goodloe, 2 Hayw. 351; Meeker v. Jackson, 3 Yates, 442; Davis v. Spooner, 3 Pick. 286; Taylor v. Riggs, 1 Pet. 591; Adams v. Leland, 7 Pick. 62.

mitting him to testify in his own case, but only admitting him to the privilege of using other evidence;"(z) it is only permitting him "to lay the foundation for the introduction of inferior proof"—distinctions certainly very nice; but do they show that the general rule is not infringed? In all these cases, the copy of the deed or note is only received upon proof, which is considered sufficient to excuse its non-production. The original being assumed as unattainable, as important as was the original, equally important becomes the substituted secondary evidence, equally necessary its introduction. Proof of loss of the original is just as "material" as, had the loss not happened, would have been the proof of the original. The fact of the loss is just as "traversable" as was the fact of the existence of the original. If such deed or note was the sole evidence by which the claim was substantiated, such deed being lost, the copy becomes as important as was the original, and whatever interest the party has in the final decision, the same interest has he in this preliminary question, the same interest to lay the foundation for secondary proof. "The privilege of using other evidence!" As important as that other evidence may be, so important is it to obtain this privilege. "Not admitted to testify in his own case!" in whose case, for whose benefit, is he admitted to testify? The loss of the deed is proved or it is not. If proved, then is it proved by the evidence of the party, and under circumstances more dangerous than if the testimony had been delivered on the final trial. If not proved, then is the secondary evidence illegally and unjustifiably received. What is obvious enough, and admitted by the judges, is, that it was almost impossible to pretend to do justice without this evidence; that if this was rejected, it could hardly be supposed that it could be obtained from any other individuals, and being unwilling to violate the general rule, the only course that remained was by some verbal quibble to admit the party, and at the same time preserve the rule inviolate. They therefore called this a preliminary question for the court. But may not a party have interest in preliminary questions as well as in any other? May he not commit perjury there as well as elsewhere? Does the fact that the evidence is for the court instead of the jury, render it more credible? Does it increase the veracity of the party? If so, if he is more trustworthy, let the judges hear all the evidence.

Though the party may be admitted to prove the loss, yet "the contents of the deed or record cannot be proved by the affidavit of the party."(a) If this be understood according to its literal import, (and the words of the court are cited) it is difficult to perceive how the lost deed and the copy can be connected together. The contents are what alone distinguish it from all other deeds, and the contents being unknown, it is impossible to say that the copy is a copy of the deed lost. Thousands of deeds may be lost or destroyed, and proved to be lost or destroyed,—yet if the one, a copy of which is introduced, should not happen to be among the number, no proof is yet afforded to warrant its

(z) 3 Pick. 286. Davis v. Spooner.

(a) Adams et al. v. Leland et al., 7 Pick. 64. "The testimony is to the loss and not the contents of the paper," remarks Marshall, C. J., in Taylor v. Riggs, 1 Peters, 591.

introduction. If the only evidence as to the contents should be *parol*, still what does such parol evidence show but the contents of *some* deed or paper? Unless the party states the contents, it cannot be known by any one that the contents of the paper testified to by the witness have any connection with the deed or paper, which the party asserts he has lost. Perhaps, however, the meaning may be, that the contents may be proved for the purpose of identifying the copy with the lost deed, but that on the final trial, and for the purposes of affecting the ultimate decision, evidence from the party shall not be received. But why this distinction, if this be the distinction, and if it be not, there is no sort or shadow of proof that shows loss of a deed, like that, the purported contents of which are proved. If the party may prove the contents for one, why not for another purpose? If he will testify the contents truly to the court, why not to the jury? Not permitted to prove the contents! But if, as the authorities show, he may prove the loss, why not the contents? He has no greater interest to prove one than the other. Both must be proved to insure his success. As he would be more likely to know the loss, so likewise would he be more likely to know the contents. If the contents can in no other way be proved, the proof of the loss is to no purpose. The same necessity which requires proof of loss requires proof of contents. If heard as to one fact, why not as to another? If it will make the witness more veracious, call it a "preliminary question," so the evidence may thereby be received; or let it be merely to obtain a privilege, or address it to the court, and let them report it to the jury, if distinctions like these make any difference in the veracity, as it seems they do in the admissibility of witnesses. If quibbles only will insure admission, quibble, if so it must be. They are never less exceptionable than when used for the purpose of procuring the admission of the truth.

Affidavit for Motions.

Antecedent or subsequent to the final trial, there are a large class of trials called motions. Unless the party making it expects to gain, he will no more trouble the court with his motion, than with his cause. Interested in his cause, he is in a similar manner interested in this preliminary decision. To sustain a motion proof is required. The party whose interest in the motion may be as great as his interest in the cause, is admitted unexamined and unquestioned at his own instance to establish the facts, by which he expects to sustain his motion. The instances in which this is done are perhaps more numerous than the causes themselves. And each instance is a violation of the general rule. In all these the question occurs, why, if so great be the danger from the testimony of parties, are they received for this purpose? The evidence, it may be said, is offered to the court. What then? is it less important that the court should hear the truth than others? Is correct information less valuable to them than to others? If this testimony be too dangerous to trust juries with it, is it not too dangerous for the judges to hear, who, in the eye of the law, are incompetent to judge of facts? So incompetent that questions of fact are not tried before them? Or is it that the judges are less likely

to be deceived, that they are better qualified to decide the relative weight of testimony? If so, let them hear all the evidence. Whatever may be the reasons assigned, still in fact here is a gross inconsistency. And if this evidence be properly admitted, if it be free from danger, there is no conceivable case in which the testimony of the party would be attended with risk.(*b*)

Admission from Necessity.

Parties from *policy* being excluded; from *necessity*, the excluded witnesses are recalled and heard. Thus words serve for admission, words for exclusion. They are admitted from necessity, where it is impossible to adduce better proof, "for that the law must not be ineffectual by impossibility of proof."(*c*) A good reason, undoubtedly, but in what conceivable case will the party offer himself, when he does not conceive his own evidence necessary? If other evidence is attainable and sufficient to establish his rights, he will not testify himself; it is only when he can procure no other proof, that, conceiving it necessary, he will offer himself. But it is only from necessity, that evidence is ever introduced. But the necessity must be one "resulting from the subject as constituted by general law," not "a casual and accidental want of proof" in particular cases. The absence of proof, if a good reason for admission in one case, is equally so in another. A particular absence of proof no reason! But the law must, in this case, "be rendered ineffectual from want of proof" as much as in any conceivable class of cases. Whenever the evidence of the party is from any cause necessary, from whatever cause the deficiency of other proof may arise, the law is rendered ineffectual. The only difference is, that, if the general rule of exclusion be a good one, the more numerous the particular cases, which fall within the exceptions, the greater the evil which is done. No matter how this want of proof occurs; whether by accident or not, *once occurring*, the necessity is the same, the argument the same for admission, as if it was within the excepted class. The law is rendered ineffectual in all cases, when necessary evidence is excluded, without any reference to the causes which create this necessity; and if the rendering the law ineffectual is a valid reason in one, it is in all possible cases. But, says Gilbert, in justifying the exclusion of evidence rendered necessary by accidental causes, "the law must prefer the suffering of particular inconvenience, rather than the suffering a general mischief."(*d*) But the rule being, as it must be assumed to be, a good one, the admission, in cases where this necessity arises from accidental causes, is only a particular mischief; and when these particular cases increase so as to become a class more or less numerous, that is, when the particular becomes a general mischief, should not the particular, the lesser mischief, be preferred? Is there not less evil in admitting a party in a particular case, which may be of rare and casual occurrence, than in a particular case, the like of which will frequently occur. Admission being an evil, one would suppose the less frequent its occurrence the better; that a casual and accidental, would be preferred to a

(*b*) The defective mode of examination will be hereafter considered.
(*c*) 1 Gilbert on Ev. 245. (*d*) 1 Gilbert, 248.

systematic and general violation, in an extensive class of cases, of a necessary and useful rule.

In what cases and as to what facts does this necessity authorize admission? In those cases where the facts are supposed to be within the knowledge of the party. The general reasoning which supports this class of exceptions, will be found fully developed by Parsons, Ch. J., in the case of Stimpson *v.* Drowne.(*e*) In this case, which was a complaint under the bastardy act, the court say that the mother, "though made a competent witness from necessity, yet her testimony ought not to be given to facts equally within the knowledge of other persons who are disinterested. As in debt on the statute of hue and cry, the party robbed is a competent witness from necessity, and he is sworn in chief; he is examined as to all facts which, from the *nature of the transaction*, must be within his own knowledge; but to the *other* facts necessary to support the action, and which, from their nature, are within the knowledge of disinterested persons, he is not examined." Remembering that on account of too great temptations to perjury, parties are excluded, let us examine this exception. It is obvious that the greater security with which perjury can be committed, the greater the probability of its existence. As to facts which may be known to any number, and which, if false, may be easily contradicted and disproved, the party is rejected. As to facts solely and exclusively within his own knowledge, he testifies without fear of contradiction, without possibility of detection, without checks of any description. Uncontrolled, unchecked, at liberty to wander, if he choose, over the whole field of falsehood, under circumstances thus dangerous, the party is admitted. In other cases where there may be disinterested witnesses, if his testimony be false, it may be disproved; in this, if false, detection, except from his own statements, is impossible—the other party suffers without hope. Is there the greatest danger of perjury when detection is easy or when it is impossible? To take away all means of detection, or to remove all fear of punishment, would seem to be an odd way of preventing the growth of perjury. But whether a good way or not, it would seem that the judges so considered it, inasmuch as in those cases alone is the party received. Perhaps, however, if that was not their opinion, the increase of perjury might have been thought a reason for admission. Increase the danger, render detection *ab extra* impossible, enable the witness, whose presumed perjury is a matter of legal presumption, never to be disputed, to perjure himself with perfect security,—do this, and then the law admits the witness from necessity. Impossibility of other proof, followed as it is with consequent impossibility of detection, a reason why, if *ever*, the testimony of a party should be refused, is adduced and sanctioned, to justify admission, by those who in the same case would shudder at questioning the same witness as to "other facts," when, if he should testify falsely, detection and punishment could hardly be avoided. To justify all this inconsistency, the word *necessity* is sufficient, as if, in some inconceivable way the word, or the necessity itself,

(*e*) 2 Mass. 444.

diminished the danger of falsehood, or lessened in any manner, the evils which the rule was intended to prevent; as if it were *necessary* to admit evidence more likely to be productive of evil than of good,—evidence which, under the most *favorable circumstances*, is assumed so incurably untrustworthy, that to prevent injustice, it is most carefully excluded.

In 1 Greenleaf's Reports, 27, Herman *v.* Drinkwater,(*f*) may be found an interesting illustration of the exception from necessity. In this case, the master of a vessel broke open and embezzled the contents of a trunk he had received to carry to another port: the delivery of the trunk and its being broken open being proved, the party was admitted to prove the contents and their value upon the ground of necessity; "he not having it in his power to establish that fact by other proof." The plaintiff, say the court, would be deprived of an adequate remedy unless admitted, and therefore they receive him. Had there been full plenary proof of the contents of the trunk, but no evidence to prove its being broken open by the defendant, except the plaintiff's, would he have been admitted? No. Yet is not his evidence as necessary, is he not as much "deprived of adequate remedy" in this as in the other case? Is it not just as hard to lose one's case from defect of proof as to one fact as to another? Yet, as to any other fact, the plaintiff would have been unhesitatingly rejected, even though he were thereby "deprived of an adequate remedy." Admitted to state *the contents of the trunk!* Suppose a note had been lost, would he have been received to state its contents to a jury? No. But is there any more danger in stating the contents of notes than of trunks? In this very case, had two trunks been in litigation, and proof of the contents of one attainable, the plaintiff would most probably have been rejected, the urgency of the case being not quite so apparent. Had the proof of the contents been of a contradictory nature, would the party have been received to corroborate the evidence by him adduced? Probably not. Had there been contradictory evidence as to the embezzlement of the contents, would the party have been allowed to strengthen, by his own evidence, the statements of the witnesses he had produced? Certainly not. Yet how much less is the danger of perjury in stating facts which may be known to any number of individuals, than in stating facts known only to himself.

But necessity will not always suffice. Were the admission of the plaintiff as a witness made by the court to depend upon whether the trunks lost had tacks or brass nails—the owner of one with tacks received—with brass nails rejected—there are few, who would not ridicule the absurdity of such a distinction. None the less absurd is it when the plaintiff is a witness or not, as he brings trover or case—as the loss

(*f*) 1 Yates, 34, Snyder v. Geiss; a similar case.
Jurare in infinitum, sed judex potest præfinire certam summam, usque ad quam juretur. Item et si juratum fuerit, licet judici vel absolvere, vel minoris condemnare. Dig. 12, 3, 4 and 5. The civil law authorizes the party in certain cases to prove the value of the goods or property taken, but places bounds, *ne in infinitum juretur.*

is by robbery or by negligence—as the contents of the trunk are articles of wearing apparel or surgical instruments. Yet if the trunk be lost by the negligence of the carrier(*g*)—or if the contents are other than articles of wearing apparel,(*h*) the party losing is not admissible to prove the fact of the loss or the number and value of the articles lost, because the loss is regarded as arising from carelessness and not from fraud—as if the *necessity*, which is the reason for admission, was not equally stringent whether the carrier was fraudulent or negligent(*i*)—whether the loss was of clothing or something else.

Book accounts, verified by the suppletory oath of the party,(*k*) may be mentioned as another exception. The party is admitted to serve himself, and sworn to make true answers. For his own interest admitted, but if the adverse party wishes to subject him to examination, as to other facts adverse to his own interest, and is willing to incur the risk, he is not allowed to do it. The effects of interest can hardly be considered less injurious in this than in any other case. The party, in the civil law, is in a similar manner admitted to supply what is wanting in the evidence, which results from his books, they being considered but half proof.

Statutory exceptions.

Without noticing more particularly the exceptions of the common law, it may not be amiss to examine the statutes enacted in reference to this subject. The legislature, recognising the absolute perfection of the exclusive rule, have still legitimatized a host of exceptions, irreconcilably at war with the general principle. A sample or two, as illustrating the wisdom and consistency of legislative action, will be offered. Searching over the whole tribe of plaintiffs and defendants for that purpose, wherever they find dishonesty, they admit; not finding, as far as possible they endeavor to create it. Such may be given as a brief description of their doings.

Exceptions under the Usury and Gaming Acts.

The usury law may serve for illustration. A note being in suit, the interest of the plaintiff to enforce, of the defendant to avoid the payment of this, is as great as of any other note of equal amount. If

(*g*) Snow v. Eastern Railroad, 12 Metcalf, 44. In Ohio it was held the owner was admissible—his testimony being limited to such articles as are usually carried in a travelling trunk. The Mad River and Lake Erie Railroad v. Fulton, 20 Ohio, 319.

(*h*) Pudor v. Eastern Railroad, 26 Maine, 458.

(*i*) On a trial of Bodmyn, *coram* Montagu, B., against a common carrier, a question arose about the things in a box, and he declared this was one of those cases, where the party might be a *witness ex necessitate rei, for every one did not show what he put in a box.* 12 Viner, Abr. 25. But Mr. Justice Hubbard thought otherwise, and that the traveller, not relying upon himself, should provide other evidence beforehand of the articles taken by him. "If he omits to do this, he then takes the chance of loss as to the value of the articles, and is guilty, in a degree, of negligence—the very thing with which he attempts to charge the carrier." 12 Met. 44.

(*k*) In Pennsylvania, it seems that a witness examined as to his books, cannot be cross-examined as to other facts without his consent. Shaw v. Levy, 17 S. & R. 99. But in some States the party in such case may testify to the admissions of his opponent as well as to every other material fact bearing upon the cause. Clark v. Marsh, 20 Vermont, 338. Stainford v. Bates, 22 Vermont, 546.

the defendant should testify that more than the legal rate of interest is reserved, the note is adjudged void, unless the plaintiff will by oath contradict this statement, when the payment is enforced. As to any other facts regarding this or any other note, the parties are refused. But, in addition to the interest, there would seem to be no common degree of turpitude in thus endeavoring to avoid the payment of a debt voluntarily contracted and justly due; and as far as such conduct goes, it affords proof of no ordinary dishonesty on the part of the defendant. The defendant, by the verity of his oath, a knave, and, if false, doubly so, is admitted, and by that very admission, encouraged to cheat the plaintiff out of his property. Such would seem to be the view that most would have of the defendant.

But by the theory of the usury law, the defendant is considered as oppressed, and the law is passed for his security. On this hypothesis the matter assumes a new aspect. The parties are both sworn and both heard; so far the course, which reason dictates, has been pursued. But they might as well have been neither sworn nor heard, for the legislature, long before the contract was entered into, have saved the judges the labor and trouble of reflection by establishing, in advance, an invariable rule, not nominally, but really invariable, by which all cases are to be decided. And how? Always in favor of the plaintiff. A law made for the especial protection and security of the oppressed—the oppressor and oppressed being both heard—the decision is invariably in favor of the individuals, whose practices the law wishes to repress. What is probable is that the defendant would rarely or never deliberately swear to the existence of usury, when no usury existed. Whether probable or not, it is still more probable that the plaintiff, indignant at the conduct of the defendant, would deny such usury, even if it were true. The balance of probabilities will be seen to be in favor of the defendant as to that fact. But the law does not permit the judge to weigh, to consider, to discriminate, even though he were ever so fully satisfied of the falsehood of the plaintiff, even though evidence *ab extra* to any amount were obtainable,—still he is bound to decide upon this false testimony as if it were true. The gaming act, passed as it was for the protection of the loser, presents the similar absurdity of requiring full and implicit credence in the statements of him, whose rapacity it was the object of the law to curb. In ordinary cases the result of false testimony is more or less uncertain; in this, in addition to the motive of interest, the plaintiff is encouraged to perjury by the absolute certainty of its successful issue; so the plaintiff on his part will only commit perjury, the legislature on their part will insure its success. Such are the terms of the contract proposed to all dishonest men. Decreeing by statute that all plaintiffs, without exception, are to be believed, they take from defendants all hope but in the integrity of the very individual whose dishonesty is assigned as a reason for trampling under foot the ordinary rules of the law.

It seems, however, notwithstanding the special confidence thus reposed in the oppressor, that if the plaintiff, the witness whose veracity the legislature have ordained should never be questioned, should, from

sickness or any other cause, be unable personally to appear, his deposition or affidavit, after due notice given to the adverse party, is not to be received, although, in motions or questions of that description, his affidavit without notice would be unhesitatingly admitted. One of those *verbal reasons*, which constitute so much of the learning of the law, is deemed amply sufficient for this distinction. It seems that the danger of perjury is greater or less as is the solemnity with which the oath is administered. The oath must, in this case, be administered by a justice of the peace; but if the party were present in court it would be done by the clerk; and as, from some cause or other, it happens that justices cannot administer the oath with as great solemnity as clerks, to prevent the inevitable increase of perjury, which would result from oaths thus defectively administered, they are prevented from doing it at all. Veracity dependent upon the room in which, and the person by whom, the oath is administered.(*h*) Such are the reasons which judicial wisdom has assigned for legislative action. Meanwhile, on the part of the plaintiff, as ample provision is made for his interests as could possibly be desired. If necessary, delay is granted; or if he should die, the defendant being excluded, his estate recovers the debt. The defendant alone is the sufferer. In addition to the trouble and expense consequent upon delay, if from sickness or death he should not appear in court, decision in favor of the plaintiff follows irrevocably. Out of court, neither can the oath be administered to *him*. To one unlearned in the law, the question might occur, why oaths, so deficient in solemnity, so replete with perjury, are ever allowed? Why, if the oaths administered by justices are so much more likely to be violated, should they ever be allowed thus to put in jeopardy the consciences of witnesses, and the rights of parties? In affidavits without notice, the oath of a magistrate will answer; with notice, and with adequate opportunity for examination, it will not answer. Solemnity is sufficient without, insufficient with, notice. For what purposes do distinctions like these serve, but to tax the memory and confuse the mind?

In the cases examined, although the only effect of the rule was to produce misdecision, where it perhaps might not have ensued, there was, at any rate, the *apparent* merit of having heard both parties; even though special provision was made, that false testimony should have the force and effect of true; that, the judge hearing should act as though he had

(*h*) 2 Pick. Rep. 67, Frye v. Barker et al. The oath of a plaintiff that usurious interest has been taken or secured, must be administered in court. If administered elsewhere the court observe that "there might be *more danger* of *false swearing* than when the party is under the solemnity of a court. We know of no case in which a party has the benefit of his own oath upon a *trial*, except when the oath is administered in court. Probably the *object of the statute was*, that the oath of defendant should be met by an oath delivered with *the same solemnity*." From whence it follows that if the oath could have been administered with the *same solemnity* by justices as by clerks, the statute, in cases of necessity, would have allowed it to have been done.

In the civil law the oath of the party might be taken at home for good and sufficient cause.

Ad egregias personas, eosque, qui valetudine impediuntur, domum oportet mitti ad jurandum. Dig. 12, 2, 15.

not heard. But the height of legislative absurdity had not then been reached. If wrong decision was the object of legislation, ample provision was already made to produce misdecision after hearing all the evidence. To hear cases by the half, and decide as they could, was an experiment, which alone was wanting to fill up the measure of possible absurdities. The occasion selected for this peculiar judicial experiment, was as remarkable as the experiment itself.(*i*)

Exceptions under the Bastardy Act.

In complaints under the bastardy act, the mother, as to certain facts, is admitted: as to all those which may be known to an indefinite number of individuals, when she may be contradicted from any and every quarter, she is refused: as to those within her own knowledge and when contradiction by the assumption can come from but one, *she* is selected for admission, and the reputed father,—the only witness whose knowledge is equally extensive with her own, is excluded.(*k*)

Perjury—policy—interest—whatever may be the reasons assigned for any and all cases of exclusion, are they not applicable with as much, nay, with greater force to the mother, than the reputed father? But the mother is admitted from necessity. From "the nature of the transaction," is not the reputed father equally conversant with every fact? Are they not all as much within his knowledge, as within that of the complainant? Is not the necessity for his admission equally great? Important as it is that the mother should be admitted to substantiate all true charges, is it any the less important, that the reputed father should be received to disprove all untrue charges? Yet the mother, degraded,(*l*) by her own confession, debased as she is proved to be by facts incontestable, is admitted, and the reputed father, whose guilt is as yet a matter of doubt and uncertainty, rejected. Is the mother so peculiarly deserving of credence, that, for her sake, the dangers of perjury, and the truth-destroying effects of interest, must be incurred? If her admission is proper, is the reputed father's any less so? The defendant, supposed innocent, is refused; the complainant, known to be guilty, heard. Even if cases must be heard by the *half*(*m*) *at a time*, was there much wisdom in the selection?

(*i*) En Italie, le serment d'une fille enceinte est reçu pour une preuve suffisante, au prejudice de celui qu'elle nomme pour père de l'enfant qu'elle porte dans son sein. . . . On respecte comme une preuve le serment d'une mechante personne qui avoue son crime au prejudice d'un autre, dont la probité n'est rendue suspecte par aucun autre indice. Par une suite d'un pratique si insenseé, en Italie, une fille qui avoue qu'elle a eu un commerce charnel avec plusieurs personnes, à la fois, conserve encore assez de credit, pour pouvoir, par son seul serment, déclarer celui dont elle est grosse. . . . Les filles choisissent presque toujours dans le fait, celui dont elles croyent se pouvoir accommoder le mieux, sans s'embarrasser du serment. Traitè des Loix Civiles. 2 Tome, 109, 110.

(*k*) Somebody else than the accused might be the father. She knows whether or not she has had criminal intercourse with others. But she is not compelled to answer inquiries made to elicit that fact. Low v. Mitchel, 18 Maine, 372. Sweet v. Sherman, 21 Vermont, 23. "*Creditur virgini dicenti se ab aliquo agnitam et ex eo prægnantem esse.*" Cod defin. lib. iv., tit. 14, def. 18.

(*l*) The credibility of a female witness may be impeached by proving that she is a common prostitute. Com. v. Murphy, 14 Mass. 387. Decided differently in New York, 13 Johnson, 504, Jackson v. Lewis.

(*m*) Cases heard half at a time. Audi alteram partem: A direction so obviously

Insolvent and fraudulent debtors; the briber and the bribed; the rapacious usurer and the distressed borrower; the gambler and his ruined victim; the infamous mother; the hired informer; the traitorous accomplice:(n)—such are the witnesses specially selected as deserving so peculiar credence, that for them the most important rules of law must be violated. Without a breach of the most liberal charity, it may be truly said, *appearances are against them*. Indeed, whenever there are peculiar objections to a witness, whenever his character is odious and depraved, provision is made for his admittance. Nor is that all. Lest the judge, if left to himself, might in some ill-advised moment decide correctly, ample and extraordinary provisions are made to render misdecision unavoidable. The truth of these observations having been renderered fully apparent by the examples already adduced, we shall not trouble the reader with any further illustrations.

What is obvious is, that the more plaintiffs or defendants there are, the more numerous are the individuals from whom truth may be obtained, and the greater the evils of exclusion. The more numerous the individuals acquainted with any transaction are, the more numerous are the sources from whence the facts may be ascertained, and the greater the evils of closing these avenues to true and trust-worthy evidence. The more witnesses there are admitted, the better is the prospect of justice. Improper as it is to exclude one, it is still worse to exclude more. As yet we have supposed but one plaintiff or defendant. Let the number be increased to any amount. The plaintiffs being more than one, is a co-plaintiff, if willing, received, if unwilling, compelled, to testify? If willing, he is never received for his co-plaintiffs, if unwilling, never compelled to testify against them. Such would be the general answer.

But a legal proposition, not accompanied with exceptions, would be an anomaly not to be endured. Accordingly, "in a recent case, a plaintiff, by *consent* of the defendant, was allowed to be examined on oath as a witness in the case, although he came to defeat the claim of his co-plaintiff."(o) Had there been any objection on the part of the plaintiff admitted, or of the defendant, the admission could not have taken place:—

proper, one would suppose could never be disregarded. It never can but at the sacrifice of justice. It will hereafter be seen to how enormous an extent this rule is neglected.

(n) Quis circumscriptor, quis ganeo, quis nepos, quis adulter, quæ mulier infamis, quis corruptor juventutis, quis corruptus, quis perditus, inveniri potest, qui se, cum Catilina, non familiarissime vixisse fateatur? Cic. in Cat. The companions of Cataline and the witnesses of the legislature seem to have been selected with similar judgment and upon similar principles. To have associated with a good man, to have admitted as a witness a party of integrity, would, in either case, have destroyed the beautiful symmetry.

(o) 3 Starkie, 1061. So of defendants. If the evidence of a defendant be sought, for the purpose of charging himself, and in contradiction to his interest, there is no legal objection to his competency, if *he chooses to testify*. 1 Phil. 63, note. But will he, will any one, choose to testify?

If one of several defendants be called as a witness in the case by the plaintiff, and he be willing to testify, he is a competent witness although his co-defendants may *object* to his being called. Miner v. Downer, 20 Vermont, 461.

If a co-plaintiff assign his interest in the suit he may be examined for the assignee on his tendering the costs of suit. 3 Rawle, 301; Contra, 2 N.H. 283; 2 Verm. 143.

the consent of both was required. This consent, on the part of the defendant, would never have been granted, but upon some understanding, express or implied, as to what would be the testimony of the co-plaintiff thus admitted. Had he supposed it adverse to his own interests, he never would have consented—consenting, he has received a pledge, express or implied, that such testimony will be to his own advantage. If, then, such pledge be given, and the co-plaintiff, after being admitted, should testify adversely to the interests of the defendant, the pledge is forfeited; and does this violation render him more deserving of confidence? But whether he is pledged or not, still if his testimony be unfavorable to the defendant, favorable to those associated with him, is he not under the influence of interest? No matter how his admission was procured, it being procured, and his testimony favorable to himself, is there not as great danger of perjury as if he had been admitted at his own instance? Does the veracity of a witness depend upon the individual at whose instance he is introduced? The testimony, then, being adverse to the defendant, he is as much under the influence of interest, his testimony as dangerous, as would have been that of any co-plaintiff, introduced at his own instance.

If the testimony of the admitted co-plaintiff should be, as is anticipated, favorable to the interests of the defendant, how happens it, that the consent of the plaintiff is obtained? That he should be willing to prejudice himself, that he should commence a suit for the purpose of having it defeated, seems not to be very probable. The fact that the plaintiff has, to a certain extent, an interest in common with other plaintiffs, by no means proves that he may not likewise have interests in common with the defendants, and adverse to the co-plaintiff. Unless the conduct of this co-plaintiff is of a peculiarly romantic description, one can hardly imagine that he will consent to prejudice himself. Consenting or choosing, then, to testify, no stronger proof can be furnished, that he has some interest adverse to his co-plaintiff and favorable to the defendant, and that he *consents* to be admitted, because he is willing to serve himself. Is he not then interested? Is he not interested as much as the defendant whom he assists? Are not their interests one and the same? And how are the other co-plaintiffs situated? Placed entirely at the mercy of the defendant, or, of what amounts to the same thing, of a co-plaintiff identified in interest with him. Co-plaintiffs, in any number, knowing the falsity of this testimony, with lips sealed must suffer in silence; they are not permitted to contradict these statements.(*p*) "But this case was so peculiarly situated that there could be no danger of perjury."(*q*) A very peculiar case, certainly, if free from all danger

(*p*) If the plaintiffs were to make a declaration out of court, evidence of that declaration would be admissible; and how is the proof less credible, said C. J. Mansfield, if, with the consent of the defendant, he declares the same thing upon oath at the time of the trial? 1 Phil. 61. One bad rule is thus made to support another. The law as regards confessions of parties was intended to have been examined in this chapter, but its length renders it necessary to defer that subject for subsequent consideration. The law as to admissions will as ill bear examination, as any portion.

(*q*) 3 Starkie, 1061, note, Norden v. Williamson, 1 Taunt. 378.

of perjury. Were a dispute to arise between two firms, in each of which the plaintiff had an interest, in the one as active, in the other as dormant partner, his interest as plaintiff minute, his interest as defendant great to any conceivable amount,—has he not adequate inducement to serve his greater, at the expense of his lesser, interest? Yet under the pretence that he is acting against his own interest, a fallacy so thin and shallow that a child at the first glance would detect it, he is admitted, and his evidence viewed as peculiarly worthy of trust. Liberty is given to a plaintiff to injure himself, if he chooses. But who will ever choose? Meantime no precautions are adopted to prevent his injuring others. The consent of his co-plaintiff is not required. The only inquiry is, whether two individuals will consent to serve themselves—so they will, they shall be heard. The consent of those who may thus be exposed to any amount of loss and expense, of those who alone will suffer, is perfectly immaterial. Whether they choose it or not, suffer they must, if their adversely interested co-plaintiff so wills it. As by the law, all those with whom a contract is made must join, the adversely interested co-plaintiff could not have been left out with safety, had the others wished it. The same law existing as to defendants, as the plaintiff can select whomsoever he pleases for defendants, he may join those in community of interest with himself at his own pleasure. So that if there should happen to be a plaintiff or defendant whose interests are opposed to their associates, his version of the matter must bind all the others, though plaintiffs or defendants to any number should offer, by their oaths, to disprove his statements. He is received, they are not heard. Such are the cases free from danger. Such is the regard for those who are so unfortunate as to be engaged in litigation.

By the theory of the law all parties are liars; and as the plaintiff can choose whom he pleases for defendants, he is thus invested with the power of destroying the "legal integrity" of others *ad libitum*, by merely making them defendants. In this is included the power of depriving the defendant of all proof, by selecting as defendants those by whom the defence would have been substantiated. It was not enough to reduce to silence all real defendants, however numerous, but the ability to destroy the legal veracity of all the defendants' witnesses must be superadded. A rule like this, more particularly in cases of tort, places the defendants in the control of the plaintiff. How then is the law? Are defendants admitted at the instance of the co-defendants, or are they compelled, at the instance of the plaintiff, to testify to the prejudice of those associated with them in the defence? To these questions the answer would be in the negative. So long as their names remain on the record, if no evidence, or the slightest, be adduced against them, they are not heard.(r) A discretion, however, in certain cases, is granted to the judge, of directing the acquittal of defendants against whom nothing is proved, for the purpose of making them witnesses. This, however, can never be claimed as a right. A verdict being rendered in favor of a de-

(r) 1 Phillips's Ev. 62, cases cited in notes. 3 Starkie, 766. If in torts the defendant suffers a default, he may be received for the others.

fendant, or in torts, by having suffered a default, is he a witness, and for whom? He is a witness for the defendants—refused if called by the plaintiffs. For this, as for every thing else, there is a reason—but what a reason! The plaintiff has waived his testimony by making him defendant.(s) With reasons like these at command, what may not the judge accomplish? He may admit or reject at pleasure. Had he chosen to admit, it would have been enough to have *waived his prior waiver*, a thing easily said, and he would have been received. Not, however, choosing to admit, he considers the waiver as binding. What the witness will testify, whether truth or falsehood—however important the testimony may be—is of no consequence. The great question upon which his admission rests, is, by whom is he called? If called by the plaintiff, no matter how important his testimony may be, or how much the plaintiff may repent of his ill judged waiver, he is irrevocably excluded. If called by the defendant, with whom it could rarely happen but that he should have some community of interest, at any rate, of feeling, he is admitted: To exculpate the defendants, admitted, to inculpate, refused. Will your testimony be for the plaintiff or defendant? As the witness may answer, he is admissible or not.

Although the defendant, when defaulted, is, in torts, received to aid his co-defendants, yet in contracts the law is different. Lord Kenyon assigns as a reason for this distinction "that he might negative the contract, and that if negatived as to one, it fails as to the other;(t) which, being interpreted, signifies, that the plaintiff has no case; that if the evidence of this defendant should be heard, it would so appear; therefore they take special care that it shall not appear. So far from showing the propriety of rejecting, it shows most forcibly the necessity of admission. Here the admission depends not so much upon the person calling, for *even the defendant* cannot always obtain the testimony in this case, but upon the words in which the writ happens to be couched—if trespass, the witness is heard—if assumpsit, refused. Nor do distinctions end here. Had the name of this co-defendant not been inserted in the writ, or, being inserted, had he been fortunate enough to escape the service, he would have been received.(u)

In the exceptions noticed, the party is introduced at his instance, or to save his own interest. In *no one instance* at common law is the party compelled to answer, if unwilling. The exceptions are all of the most dangerous description, and if proper, what becomes of the rule? If the party can with safety be received under the most dangerous cir-

(s) 1 Phil. Ev. 63. "The plaintiff cannot ordinarily examine a defendant . . . against whom nothing is proved, because he is considered as having *waived* his testimony by making him defendant."

(t) 1 Phil. Ev. 63.

(u) 1 Pick. Rep. 121, Gibbs v. Bryant; 2 Pet. Rep. 186, Le Roy v. Johnson. In the latter cases releases might have been necessary. But cannot a man, whose name is in a writ, sign a release, as well as any body else?

But the authorities are at variance. In Bate v. Russel, 1 M. & M. 332, it was held, that where the defendant pleads a matter in personal discharge, a verdict may be taken for him, and he may be examined for his co-defendants. Contra, 9 Wend. 286. 2 N. H. 283. 1 Bailey, 308.

cumstances, if indeed his evidence is *necessary* under those circumstances, why should he ever be excluded?

But to what purpose wander, without a clue, through the Dædalean labyrinth of the common law? Bad rules being established, their violation is the part of wisdom. The rule and the exceptions cannot stand together. The sooner it is determined which shall predominate, the better.

So much for the "*pure and tried reason*"(*v*) of the common law. How much preferable may be equity, remains for further consideration.(*w*)

(*v*) Plowden.

(*w*) By the law of Scotland "if a person shall, without reasonable cause, make another a party to any suit for the purpose of excluding his testimony, the law will not allow him to obtain such an object: and one, who has been included in the list of defenders for this purpose, whether in a civil or a criminal action, shall, upon discovery of the circumstance, be a good witness notwithstanding." Tait on Evidence, 360. "The cause will be advised first as to him, and when he has been *assoilzied*, he may be examined as a witness for the other parties called." *Ib.*

CHAPTER VI.

ADMISSION OF PARTIES IN COURTS OF EQUITY.

At common law, it was found "*essential to the pure administration of justice,*" that the testimony of the party, whether favorable or adverse, should, with certain exceptions, be excluded.

Let us now pass to Chancery, and examine the rules which a new set of masters have given us. The jurisdiction of courts of law and equity, and the extent of their respective powers, are so involved in doubt and uncertainty, that neither judges nor chancellors can agree, and whether each or either will afford redress can only be known with certainty after trying the experiment. The vague and shadowy distinctions, which mark the imaginary boundaries of their respective powers, have never yet been clearly settled. Such, meanwhile is common law; so defective its organization; so deplorably are the ends of justice perverted by exclusion of testimony; and so apparent was this, that a remedy of some sort was necessary to the well being of society.(*a*) That remedy the courts of law neglected or refused to provide: to hear all the evidence in a case, to ascertain all that might be necessary to a correct decision, was so utterly abhorrent to their views of right, that in no way could they be induced to accede to such a proposition.

Accordingly another system of procedure, and different rules of evidence based on the acknowledged imbecility, or incompetency of common law, are established. At common law all papers in the possession, all facts in the exclusive knowledge of the parties, were withheld. Content with a portion only of the facts, the courts decided as correctly as could be done in partial ignorance of the subject matter of their decision. In equity, by means of compulsory discovery on oath, and thus *purging the conscience*, they obtain a more full, complete and accurate knowledge of the facts before decision; which being obtained, "*the judgment is the same in equity as it would have been at law.*"(*b*) From hence we learn, that at common law, they do not discover the truth, that they decide without such discovery, or without even attempting to make such discovery, and that equity discovering the truth, gives judgment. A greater condemnation of common law cannot be conceived. The same facts existing, yet from deficiency of proof different judgments are given, and this is admitted by all; yet common law doing injustice or permitting it to be done, neither wishes for nor attempts a remedy. The unlearned might

(*a*) See 2 American Jurist, 314, for a very able and interesting paper on Chancery Jurisdiction.

(*b*) 3 Bl. Com. 437.

naturally inquire why it is not as important that the facts should be known in one court as another? Why justice, and truth as a mean of obtaining justice, are not as important at common law as in equity? Why the facts in each case being the same, any portion of them necessary or desirable to correct decision, should be withheld? How, if one course be right, its opposite can be other than wrong? and if wrong, why the defect has been suffered to remain? Similar to these would be the inquiries of the mere layman, on first learning that the two great courts of the country administered justice on diverse principles and with different results; that they were perpetually at cross purposes, the one busily engaged in undoing what the other had done: each, however, in its respective sphere, being the perfection of human reason.

The rules of common law are the result of the most enlightened intelligence, and yet so bad, that society can hardly exist under their influence; its procedure is correct, yet so perversive of the ends of justice, that a new jurisdiction must be specially created to palliate or remedy its defective operations. The remedy comes not in the shape of repeal, but of exceptions, thus apparently sanctioning the general rule whose incurable evils it was established to prevent. To retrace their steps, when wrong, might seem a partial waiver of their high claims to infallibility; to create exceptions would only place the propriety of the rule on a more firm and stable foundation.(c) Such would seem to be the reasoning by which rules utterly at variance with each other, are permitted to exist—rules reconcileable on no conciliatory hypothesis, mutually condemnatory of each other, and yet mutually lauded, as the case may be, by judge or chancellor.

It remains, then, to examine the rules of evidence in equity, for the purpose of ascertaining the consistency of these rules as between court and court, and even in the same court, and their adaptation to the ends of justice.

At common law all facts within the knowledge of a party, if adverse to his interests, might remain there forever: as for eliciting such facts, the courts have no mode, no process; and had they ever so many, the hardship of disclosing such facts, is a reason amply sufficient to exonerate the party from declaring them. All testimony favorable to the party, however necessary or important such testimony may be, they refuse to receive, and this as a measure of spiritual precaution, lest, by chance, he should commit perjury. By the short and easy assumption, that all parties are liars, the judge is at once saved the trouble of hearing and deciding.

At common law the evil to be remedied was the exclusion of the testimony of the party, whether at his own or at the instance of his opponent. In equity the courts have established a partial change, no one, as at common law, being admissible to support his own claims, every one being compellable to testify at the instance of his adversary. Of

(c) Exceptio probat regulam. The unanswerable argument, if correct, in favor of common law; for what rule has not its exceptions? Regula probat exceptionem—and thus both are *proved*.

the two great divisions of testimony, self-serving and self-disserving, one portion is thus utterly excluded.

Remembering the reasons, at common law, for excluding self-disserving testimony, let us see if those reasons do not require a similar exclusion in equity. As it depends on the plaintiff, *orator*, to commence the suit and examine the defendant as far as he may choose, he will of course never commence but to the intended and expected disservice of such defendant. The power of the court is exerted, and exerted without reluctance, to obtain facts and documentary evidence, which it is anticipated will be injurious to the interests of the party examined, and which, the more injurious they may be, the more reluctant will he be to disclose. At common law, the hardship of delivering such testimony was deemed a sufficient reason for exonerating the defendant from giving it utterance. The case is hard at common law; so hard that for this cause the party is excused from stating facts adverse to his interests. Is it any the less hard to disclose those facts when a suit is commenced by bill than by writ? at equity than at common law? The judge of a common law court, deeply commiserating the hardship of doing justice or of giving testimony, which by any possibility might lead to results so disastrous, most readily, for that cause, exempts all unwilling witnesses from testifying. Change not the party, nor the room, nor the bench, nor the sacred wig, nor the learned judge, who wears it—change only the name of the process from *writ* to *bill*, the titular appellation of the presiding magistrate from judge to chancellor, and the logic once so valid is perceived to be utterly without foundation. The answer of the defendant is compelled, even though millions may be at stake. By how much is the *hardship* of giving testimony prejudicial to one's self diminished? Is it any the less hard to lose an estate by the decree of a chancellor, than by the verdict of a jury? by the soothing words of equity, than by the harsher process of common law? Will one bear with more philosophy the utter ruin of his prospects, because a lord chancellor has ordained it? If not, then why this difference between these courts?

The importance and complexity of these suits may be urged as a reason for the exception, because, such facts being necessary for correct decision, could in no other way be obtained. Is the truth then exclusively necessary and desirable before a chancellor? Is the judge careless and indifferent to the result? But the more important the facts may be to the elucidation of the cause in controversy, the greater will be the hardship, when they are adverse, in disclosing them. If in a comparatively simple and unimportant case, the compelled testimony of a party be attended with hardship sufficient to justify its exclusion; increase that hardship, and the propriety and fitness of the rule is proportionally increased:—increase that hardship and the dangers of perjury, for the purpose of avoiding it, are thereby multiplied. The greater the amount involved may be, the greater are the evils resulting from misdecision, should such testimony prove false, so that if it be admissible at equity, so much more should it be so at common law.

Still less is any reason for admission to be derived from the peculiar

class of cases in which this testimony is received. It is obvious, (the mendacity-restraining motives in each case being the same) that the danger of false testimony will be as the strength of the sinister motive impelling—that an individual with right on his side, will not have the same motive as one in the wrong—the honest as the dishonest. Both parties at common law, and in the absence of any special presumption of dishonesty, are excluded. In equity to detect and elicit fraud, to discover and enforce secret trusts, by resorting to the conscience of the party (for their skill in this respect is a matter of which they boast) they admit—whom? The injured? No; him who is supposed fraudulent, whose fraud is to be detected; one, against whom, by their own hypothesis, there are ample reasons for the utmost caution; and that too when, if ever, there is special danger. In the very case where there is most peril, the assumed knave, from whom additional knavery is anticipated—a man by the very supposition, which justifies his admission, dishonest—is compelled to testify where his interests, based upon fraud, are in issue. In vain can it be urged, that this is the only mode of detecting fraud; still, though it be the only mode, yet if in ordinary cases there be good and sufficient reasons for exclusion, the argument is much more cogent when fraud and dishonesty are presumed, unless such fraud and dishonesty afford reasons for anticipating veracity. Of men of average integrity, occupying the station of party to a suit, perjury is the legal presumption; of men of extraordinary dishonesty, integrity is expected. Of honest men, lest they should lie, no inquiries are to be made; of the dishonest, there is no suspicion.

It may be said, that, as the facts are known only to the party, resort must be had to him or to no one. As to facts known to an indefinite number of individuals, the party is excluded; when he is the sole and exclusive possessor of the evidence in the case, he is admitted. But when the facts are entirely within his own knowledge, he testifies without check or restraint: if falsely, no one can detect or contradict him; the opposing party is entirely at his mercy. The security for truth is the least, the danger of falsehood is the greatest, for when there is no chance of detection, there are no scruples, no fears. Is there no danger of perjury before my Lord Chancellor? Does the difference between the several appellations by which the suits are distinguished afford any security for truth? Are words things? If so, call all judges chancellors, if thereby the trustworthiness of witnesses can be increased. Is equity alone potent to purge the conscience? cannot the same be done at law, or is the chancellor alone master of the spell? It would, at any rate, seem that the parties selected, and the cases in which they are selected, were those which afford the least sanction for such variation from the general rule of the common law.

But though the evidence of the defendant was desired on account of the supposed aid it would afford the plaintiff, it was by no means certain that such aid would be rendered. Until it is heard, its purport could not be known. What then if the defendant, called to disserve, should conclude to serve his own interests? What if the assumed knave should verify your assumptions by proving a real one?

The testimony of the defendant, whether true or false, being in this event, contrary to the anticipations of the plaintiff, self-serving, would seem to be liable to all the reasons, which exist for any other portion of similar testimony. The danger of perjury on the part of the witness, of deception on the part of the judge, suffice in ordinary cases for exclusion. If perjury be the legal presumption in case of self-serving testimony of the plaintiff, introduced at his own instance, is it not equally so, of similar testimony delivered by the defendant? The favorable testimony of the plaintiff in his own case is no more likely to be perjured, than that of a defendant whose evidence is self-serving—that is, testimony favorable to the party delivering it is no more likely to be false, because the witness occupies the station of plaintiff, than if he occupy that of defendant. If presumed perjury be a sufficient ground for refusing to hear the favorable testimony of the plaintiff or defendant, when introduced by themselves, is it not equally so, though such proof be extracted at the instance of their respective opponents? If self-serving testimony be in and of itself dangerous, deceptive, prejudicial to the ends of justice, it matters not by whom it is introduced; it should never be the basis of the decision of the court. The danger whether of perjury or deception, is in the intrinsic character of the testimony, not in the mode of its introduction. Whether the self-serving testimony of the defendant were proffered by himself, or obtained in answer to interrogatories of the plaintiff, can make no difference. The judge should investigate the testimony before him. How such testimony was obtained or by whom elicited, is assuredly of secondary importance. If there be danger of perjury in the one case, there is equal danger in the other; in all cases. If the judge be competent to decide in the one case, he is equally so in the other. Whether the evidence be that of the plaintiff or of the defendant; whether it be offered by the party uttering it, or be called for by his opponent, can neither add to nor diminish its trustworthiness. If then such testimony be dangerous it should not be received, and the answer, if favorable to the defendant, should be rejected; or if received, the similar testimony of the plaintiff, which cannot be more dangerous and may be equally material, (indeed all self-serving testimony) should be admitted. Whatever may be the answer, whether favorable or adverse, it should seem that the objections to its admission were as strong in equity as at common law; and to be consistent, the same rules should be observed in each court.

The answer of the defendant, if adverse to his own interests, will obviously be satisfactory to the plaintiff by whom it was required. If favorable to the interests of the defendant, and of course, so far prejudicial to those of the plaintiff, can the plaintiff be received to contradict or disprove such statements? The plaintiff, by the assumption of the court, is honest and injured; the defendant is dishonest and the injuring party. Can the honest man be heard in his own favor? No, unhesitatingly answers equity. The plaintiff, relying for success on the conscience-purging process of equity, and finding it ineffectual, cannot be heard. If one can be heard, why not the other? Why this superabundance of caution? Of two witnesses equally conversant with all

the facts, one is taken and the other refused. The plaintiff bound hand and foot is delivered over to his dishonest antagonist to be tormented. When acting for the avowed purpose of detecting fraud, what course is more obvious than to inquire of all, who may have been conversant with the transaction in dispute? What course can be more directly opposed to the plainest dictates of the most limited intelligence, than to hear one party and refuse to hear the other? To decide without proof was the rule of common law; to equity belongs the greater glory of hearing cases by the half, and that from choice and from principle. The exclusion is because the chancellor is either unwilling or unable to decide upon their several opposing statements. If he is unable to do this, what is it but an admission of his utter incompetency to the duties of his station? If he is unwilling to decide, it is only an exchange of improbity for imbecility. When the aid of judicial investigation is needed in cases of conflicting testimony, it fails; or if granted, it is only on condition that the means for correct decision shall be withheld. If either of the reasons just stated be correct—and it is difficult to perceive any other—what is to be thought of the course adopted? The chancellor hears half, and excludes the rest of the case, lest hearing all he should misdecide. What if all the testimony which the defendant might wish to adduce were excluded, from a fear that the judge, after hearing all, might be puzzled in arriving at correct conclusions?

Remembering the special object and peculiar boast of chancery—the discovery and prevention of fraud and the enforcing of trusts, and this more particularly, when the facts are in the exclusive knowledge of the parties—the impropriety of the exclusion seems to be still more glaring. Resort would never be had to the testimony of the parties, except in the absence of other proof. The plaintiff would never offer his own statements, because of the evident caution and circumspection and distrust with which they would be received; he would never call for those of his opponent, because of the danger to his own interests arising from such testimony, unless under circumstances of the most urgent necessity. If there be controversies, and the existence of litigation establishes that fact, a due regard to the interests of truth require, that information to guide and enlighten the judge, should be sought for from every accessible source. When the testimony of the defendant is self-disserving, the plaintiff will never offer his own testimony, nor will it be called for by his opponent; it is only when the defendant is self-serving, that for the purposes of correction or refutation, he will desire the introduction of his own testimony. By rejecting the plaintiff's testimony, implicit trust and unhesitating reliance is placed in the defendant, and when misplaced, the party with the requisite intelligence to correct all errors, whether of intention or inadvertence, is entirely shut out. The rule of equity by admitting one party, assumes the existence of cases, where the examination of a party is called for by a due regard to the ends of justice; that there are facts, which can only be elicited from this source, and that unless they are elicited, misdecision will ensue. As to facts in the sole and exclusive knowledge of the defendant, the answer must be taken as true; as to those within their mutual knowledge, the strongest reasons

exist for hearing each. They would serve as mutual checks and correctives. If the defendant, whether intentionally or not, should testify untruly, the plaintiff can detect and point out whatever of inaccuracy or falsehood may exist. Excluding him, falsehood triumphs; admitting him, its success is less certain. A strict and scrutinizing analysis will detect the truth amid their several conflicting and opposing statements. Dangerous as may be the admission of the plaintiff and defendant (if it be dangerous, which is denied) infinitely more dangerous would be the admission of one alone, whether plaintiff or defendant. Why then should not both, possessing equal information, both—for aught that can be known to authorize the judge to form a different opinion—equally honest, be received. Because they are interested, and the testimony will favor such interest? The interest of one is counterbalanced by the equal and opposing interest of the other. The defendant, to whom the objection equally applies, has already been heard to support his own interests. The plaintiff, by the supposition, alone knows the falsehood of the testimony delivered, and by rejecting him, misdecision is unavoidable. All contracts susceptible only of proof in this mode, all rights acquired in the presence only of the parties, may be annulled, and the very object of equity jurisdiction, so far as this class of cases is concerned, be defeated, whenever the defendant is dishonest. And let it be remembered had he been honest, the suits would never have existed.

The testimony of the defendant is compelled, and whether favorable or unfavorable, received; the plaintiff, to subserve his own interests, is not receivable. Is he liable to similar compulsion at the instance of the defendant? There have been instances of partial relenting from the rigor of the general rule on the part of the chancellor, by which he has received the answer of a plaintiff consenting;(*d*) but there are no instances of his compelling an unwilling plaintiff to be examined. In Fereday v. Wightwick,(*e*) the defendant petitioned that he might be at liberty to examine one of the plaintiffs as a witness; the plaintiffs were co-partners and had a common interest adverse to the petitioner. "There is," said the master of the rolls, "no rule, which can justify one making the order prayed for; it would dispense in all cases with a bill of discovery. In Walker v. Wingfield(*f*) the plaintiff consented to be examined, which removed the objection of compelling a party in a suit to be a witness against himself."(*g*) The loss of a cross bill apparently forms the principal objection to granting the prayer of the petitioner. The recurrence to any supposed inexpediency in compelling a party to a suit to be a witness against himself can hardly be considered other than (to use a

(*d*) *Consenting* to be examined! Would the plaintiff consent to his own injury? If nay, wherein differs his case in fact from a plaintiff introducing his own testimony, his testimony being self-serving? If yea, why did he assume the hazards of a plaintiff, when thus ready to relinquish any benefits from that station?

(*e*) 4 Russell, Ch. Rep. 114.

(*f*) 15 Ves. 178.

(*g*) Eglantyne v. Collins, 31st Oct. 1808. On the application of the plaintiff, and defendant *consenting*, an order was made to examine co-plaintiffs as witnesses. Reg. Lib. 1817. A. 1281.

If one of the defendants is examined at the instance of the plaintiff, no decree can be had against him. 1 Hoff. Ch. Pr. 485.

Benthamic word) a *post-prandial* remark, inadvertently made, and for which the chancellor should not be responsible, inasmuch as such compulsion forms the grand distinctive characteristic of his court. The result of the authorities in equity is, that the evidence of the plaintiff, however important it may be, cannot, in any way, be compulsorily extracted at the instance of a defendant. To accomplish this, for it may be done, a cross bill, in which the parties change places, is considered indispensable. The former plaintiff, so untrustworthy as not to be heard, suddenly, by mere change of station, becomes regenerated and purified from any lurking taint or suspicion of mendacity; nay more, he is not merely regenerated and purified, but receives such an unlooked for and wonderful accession of trustworthiness, that his answer, even though favorable, is considered stronger and more convincing proof than that of any disinterested witness, no matter how exalted his reputation may be. Directly, whether from the hardship or the danger of perjury, such testimony is not received; indirectly, by the institution of a new suit, it is receivable. Here, as so often elsewhere, occurs the inquiry, why, if admissible circuitously, it cannot be directly? Admissible it may be with two sets of fees, at the diminished expense of one, utterly inadmissible. Reluctance to resort to compulsory testimony—was it real or fictitious? Hardship being the reason, increase that hardship, perjury the reason—increase the motives to perjury, by the augmented expenses of a second suit, and then the witness is compelled to answer. The reasons of a rule being given, increase the strength and cogency of those reasons, and the rule is no longer observed.

When then the facts necessary to a full defence rests in the bosom of the plaintiff or plaintiffs, a cross bill, by way of defence, is exhibited, for the purpose of procuring such testimony, and in this way only is the answer of the plaintiff obtainable.(*h*) The evidence being unknown to the parties, the defendant can never know whether the testimony of the plaintiff will be required to sustain his defence, till after publication. The proof taken and concealed, to file a bill in advance and uncertain as to its necessity, would certainly be an uncommon course on the part of the defendant. To ascertain its necessity, it is requisite that he should know all the evidence; to examine for that purpose, he is not permitted; so that, if he file a bill, it must be when he is totally ignorant as to the propriety of the step. When he comes, after the publication, to ascertain its necessity—and he could then alone ascertain it, unless gifted with prophecy, he could look into the dark recesses of the examiner's office—it is then too late to file his bill. Finding no hope of redress upon the evidence, and knowing that the plaintiff's testimony, if according to the facts, will establish his claims, he is not allowed to call for such testimony. Why?(*i*) Because, says Chancellor Kent, "it would be exposing the plaintiff to the most dangerous temptation, if after he

(*h*) Barton's Eq. 122. 1 Hoff. Ch. Pr. 345.

(*i*) The rules on this subject will be found in 7 John. Ch. Rep. 252. Field v. Schieffelir; and 2 John. Ch. R. 432, Hamersly v. Lambert. The chancery rules as to the examination, publication, &c., of testimony, are reserved for subsequent discussion.

has been informed by the history of the suit, that no farther testimony could be produced against him, and, that the cause was absolutely his, unless he swore it away, the defendant was then permitted by a cross bill to fish for his answer." The reasoning, if valid, it will be perceived, is applicable to all original bills to discover facts resting in the knowledge of both parties, or of the defendant alone; applicable to all those cases, where more especially the aid of chancery is necessary, and in fact, if adopted, would nearly annihilate the benefits of equity jurisdiction. The temptation to the defendant in one case is as great as to the plaintiff in the other; the matter at stake is equally important to each, and were there any, the most remote approximation to any thing like consistency or uniformity, the same course would always be pursued.

But the reasoning here cited is unsound. Nothing but the extremest necessity will ever induce the defendant to call on one adversely interested, and never till such necessity becomes apparent: when apparent, it is too late; lest the plaintiff may perjure himself, injustice *shall* be done. Upon the defendant is the risk, upon him is the danger of calling for such testimony; without it, failure is inevitable; with it, there is some hope. Why then refuse, when necessary, to permit him to resort to the only means in his power for redress? Why permit injustice with certainty to triumph out of extraordinary care for the conscience of another, who, by the assumption, which justifies his exclusion, either has none at all, or one so abandoned as hardly to be worth looking after.

The evidence of both parties being obtained by bills mutually filed *inter sese*, and this at the expense of two suits, can the answer of the former defendant be used in the second suit, in which he figures as plaintiff. No;(*k*) unless the now defendant thinking thereby his own interests could be promoted, should see fit to introduce it. In no way can the plaintiff, for the protection or preservation of his own rights, compel its introduction. The chancellor, if it is presented by particular hands, by those least likely ever to offer it, is ready to receive it; if not offered, so much the better; the labor of comparison and investigation is saved. As for the result, what cares he? as for seeking for evidence to aid him in arriving at correct results, why should he be at that trouble? though it were only to compel the production of papers known to him to exist; known as taken in the same case and as forming or having formed the basis of former action. The case is not his; decision is all which is required at his hands; whether the decree be correct or not, is hardly thought deserving of consideration. So he decides, he is satisfied.

Notwithstanding the authority cited below, it should seem, that by the usual practice, both cases come on together for hearing and ultimate decision, and that the chancellor adjudicates reluctantly, probably, it being such an anomaly, upon the statements and answers of both.

(*k*) 1 Johns. Ch. R. 141. Phillips v. Thompson. "The plaintiff cannot read his own answer to the bill of discovery, in the cross suit, unless the defendant choose first to produce it in evidence. The plaintiff cannot testify for himself unless at the instance, and on the call of the defendants: and it is for the *defendants to determine* whether the answer is to be admitted as evidence, in this cause or not."

The perverse fondness for hearing causes by the halves is not alone confined to equity.(*l*) The plaintiff refuses to contradict the answer; not hearing him, adverse decision is made on the testimony of the defendant alone. Suppose the answer false, or charged as false, and the defendant indicted for perjury; the plaintiff now becomes a witness to procure the conviction of the defendant, while the defendant's testimony is peremptorily excluded. The plaintiff is heard, but not to aid himself; heard after it is too late to afford any redress. The defendant, a good and exceedingly trustworthy witness, is excluded on the indictment. To the same facts there are two witnesses; one alone is heard on each trial and in each court; both never. Thus are withheld the means of correct, and thus are doubled the chances of incorrect decision.

Objectionable, so far as the ends of justice are concerned, as are the exclusions; inconsistent as between court and court, and even in the same court, as are the admissions, still worse are the modes of extraction and the uses made of the evidence extracted.

The testimony of the defendant being delivered only at the request of the plaintiff and to subserve his interests, the extent of the answer and the number and variety of the facts disclosed, are thus almost entirely within his control. He calls for those papers, selects those facts, proposes those questions, which he imagines will induce results favorable to his own interests. Whether the plaintiff will desire to present a full and accurate view of the case, whether he will frame interrogatories to that end, will depend on his opinion of the merits of his case. The better it may be, the more full and thorough will be the investigation; the worse it is, the more guarded and cautious will he be in his interrogatories, lest they should receive answers, which, though true, should be unfavorable. If he is in the wrong, his wish will be that the favorable portion of the facts should be received, and that the residue should be withheld. The defendant, except in his answer to the plaintiff, cannot as a witness introduce any evidence; he is entirely dependent on the plaintiff as to how many, or how few, of the facts, shall be disclosed. Whether any or all of the facts shall be made known, depends not on the merits of the cause, nor on the truth of the facts, nor on the order of the chancellor, but upon the ingenuity with which his counsel may weave together, in the answer, facts of each description, and upon the necessities which may operate on the plaintiff in making his inquiries. However just the cause of the defendant may be, its justice can never be known if the plaintiff conceive that he has sufficient proof without recourse to the defendant; or if, calling on him, he can so shape or select his interrogatories that answers pertinent to the interrogatories shall necessarily and unavoidably present a distorted and incorrect view of the case. Indeed, aided by sagacious counsel, he may so shape his bill

(*l*) Hearing causes by the halves is no new device. It leads to the dispatch of business. The Emperor Claudius finding that it facilitated decision adopted it, but not to the satisfaction of the public. Seneca says of him,

"Quo non alius
Potuit citius discere causas;
Una tantum parte audita;
Sæpe et neutra."—Seneca, Apocol. 11.

for relief as to deprive the defendant of the benefit of an affirmative answer. The defendant cannot, unless interrogated, state the whole truth. The chancellor never troubles himself whether much or little of a cause be known; he never asks(*m*) or thinks of asking a question, but leaves the whole investigation to the one best able and most disposed to conceal the truth. With a portion of the facts presented for adjudication, and that known, decision is made; he never attempts to increase that portion. The arrangement, though well fitted to protect the plaintiff, seems ill adapted to the only end that is of importance, correct decision.

The testimony of the defendant being obtained in the manner above pointed out, the force and effect of the answer comes up for consideration. Not satisfied with excluding great masses of testimony indispensably necessary to a correct decision; and with extracting the evidence received in the worst possible mode, courts of equity have established a set of rules by which to weigh the testimony admitted; rules formed without the most remote reference to the occasions in which they are to be used, and admirably adapted to prevent correct results.

Borrowed as chancery jurisprudence is from that of imperial Rome, recurrence to the civil law will afford at once light and illustration. By the civil law one alone could be heard in a cause; never at his own choice, but always at that of his opponent. Either might defer the oath to his opponent, who might either take or refer it back to the party first tendering it. If he should do neither, the decision was against him. The party to whom the oath was *referred* must either take it or lose his cause. The oath, so taken was considered conclusively true. Though proof were newly discovered, and ever so many witnesses were at hand to refute the assertions in the answer, such proof was rejected. Some of our own States(*n*) seem to have adopted this rule.(*o*) The evil of the rule is obvious. The plaintiff's rights are placed entirely at the mercy of one adversely interested, and who by the assurance of successful perjury is thus afforded extraordinary inducements to swerve from the path

(*m*) By the civil law, the judge, for his more perfect satisfaction, might defer the oath to either party; which, unlike the oath deferred by the party, must be taken by the party to whom it was deferred, upon pain of the loss of his cause. 1 Evans' Poth. 514, et seq. 1 Hoff. Ch. Pr. 505.

(*n*) Swift's Evidence, 118.

(*o*) All laws have their fictions. In none can the purposes of jurisprudence be answered by the truth alone. A mutual contract obligatory on the party referring and deferring, by which each agrees not to disprove or deny what may be so sworn, is assumed as the foundation of the rule. *Ex pactione ipsorum litigatorum . . . deciduntur controversiæ*, says Justinian. Pothier assumes the existence of the same contract, and thinks it a matter of good faith, that as the parties have made such an agreement, they should abide by it. That the law is thus; that the judges having so determined, will act as if there were such a contract, cannot be doubted. But was there any such voluntary agreement of the parties? Would any man of sane mind enter into a contract or agreement, the effect of which would be to prevent his disproving falsehoods prejudicial to his own interests?—would any one agree to give falsehood the force and effect of truth? and that to his own injury. If not—if no one would ever think of entering into such an agreement—then the basis of the rule fails. The contract is a mere figment of the imagination, and all supposed assent of the party is at once at an end. So much for the *only* reason assigned for the rule.

of integrity. By guarantying success to mendacity, so far as human foresight could provide, the best means are adopted to ensure its existence.

The rules of equity are somewhat variant from the rules of the civil law, which, as has been seen, absolutely exclude contradiction or refutation to the answer. In equity it receives a modified trustworthiness. It may be contradicted or disproved, but equity, not daring to trust the chancellor, who may hear, to decide when it is disproved, centuries ago laid down rules establishing the precise quantum of credence to be given to all future answers, by all future chancellors. The rule laid down in the earliest chancery reports and confirmed by successive decisions, is, that two disinterested witnesses are necessary to do away the force and effect of the answer.(*p*) Mr. Chief Justice Marshall, in laying down the rule, lays down, likewise, the reasons on which it is based, so that the law and its logic are together presented to the consideration of the reader:

"The rule that an answer must prevail unless contradicted by one witness as well as by circumstances, is said to be so inflexible, that the strongest circumstances will not themselves be sufficient to outweigh an answer."

"The general rule that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsive to a bill, is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony,(*q*) it is equal to the testimony of any other witness: and as the plaintiff cannot prevail if the balance of proof be not in his favor, he must have circumstances in addition to his single witness to turn the balance."(*r*) Error, when sanctioned by the authority and reasoning of a mind of such deep penetration, strength and logical grandeur as that of Mr. Chief Justice Marshall, requires a scrutiny rigid and severe for its detection.

"The plaintiff calls upon the defendant to answer, &c., and thereby admits his answer to be evidence. If it is testimony, it is equal to the testimony of any other witness." Because the answer is evidence, it does not necessarily follow that it is true: because evidence, it does not follow that it is either inferior, equal, or superior to any other testimony. The plaintiff calls on the defendant and thereby admits his answer to be evidence—and suppose he does—he admits it as evidence to be judged of according to its weight. He cannot by any implication be considered as *voluntarily* admitting that it should receive an undue and improper

(*p*) 3 Ch. Ca. 123, Allane v. Jourdan, 1 Vern. 161. Mortimer v. Orchard, 2 Ves. Jr. 243. 9 Cranch, 153. Clarke's Ex'rs v. Van Ramsdyck, 5 Pet. U. S. Rep. 111. Bank of Georgetown v. Gray, 10 Johns. 24, Clasen v. Morris, &c.

(*q*) Where an answer is positive, no decree can be made against it, upon the testimony of a single witness. If, however, there are circumstances, which strengthen the witness and entitle him to greater credit, this forms an exception. In weighing circumstances, *equal credit is to be given to each witness, and it is to be forgotten, that one is disinterested.* Sturtevant v. Waterbury, 1 Edwards, Rep. 442. Witnesses balance as in a *contra* dance.

(*r*) Per Marshall, C. J., in Clarke's Ex'rs v. Van Ramsdyck, 9 Cranch, Rep. 153. The rule in equity is not adopted in Admiralty. 3 Sumner, 130.

credence. By calling on the defendant and making his answer evidence he does not voluntarily assent, though the law may compel him to assent, that this testimony, when false, should be received and acted upon as true; or that the question of its truth should be discussed on any other than the ordinary rules of belief.

If this be true, how stands the rule? "*If it is testimony, it is equal to the testimony of any other witness.*" Because it *is* testimony the inference is not the most logical, that for *that* cause it is equal to the testimony of any other witness. Are all witnesses, because they occupy that station, equally trustworthy? The hypothesis upon which the argument is founded, is, that all men, when witnesses, are possessed of equal veracity, and that in case of the opposing statements of an equal number of witnesses, as they mutually balance each other, oath for oath, there must be judgment for the defendant. Are all men equally honest? all deserving equal credit? If so, counting(*s*) the number of witnesses is all that is requisite to arrive at correct decision. Would the chief justice, who, for his own guidance, adopts this rule, ever give similar directions to guide a jury in their investigations?

In case of extraneous and disinterested witnesses, the doctrine is seen to be utterly absurd. It is still worse to assume the same equality as between interested witnesses and disinterested extraneous witnesses. Were this all, it might be tolerated. But this rule says that a party, interested as he is, with all the feeling and passion consequent on litigation, is *more* trustworthy than any disinterested witness, and imperatively requires decision in conformity with this principle. It says that interest, passion, revenge, all those feelings called forth by a judicial contest, not merely exert no sinister influence, but on the contrary, that they exert a most marvellously truth-inducing influence. At common law, perjury is presumed to be the necessary and inevitable consequence of receiving the testimony of a party; in equity, the same judge eschews his own words, says the party is more entitled to confidence than any witness however honorable and upright he may be. This rule is applicable, too, not to one party merely or to one suit, but is uniform in its application to all defendants, past, present, and to come.

Mr. Justice Thompson supports the propriety of the general rule in the following language: "When the answer and testimony are at variance, it then becomes a question of credibility. The answer is not to be discredited, nor any presumption indulged against it, on account of its being the testimony of a party interested. He is made a witness by his adversary, and it would be unjust to compel him to testify, and then consider his testimony unworthy of credit, because he is a party in the suit."(*t*)

"It then becomes a question of credibility." If so, why not treat it as a question of credibility—as in every other case it is treated. How can that be a question of credibility to be considered, when the precise

(*s*) "If there be contradictory evidence let the king decide by the plurality of credible witnesses: if equality in number by superiority in virtue." Institutes of Menu, c. 8, § 73.

(*t*). Clason v. Morris, 10 Johns. Rep. 342.

value of the testimony, the credibility of which is to be discussed, is in advance set forth by metes and bounds? How can there be a question of credibility, when in the outset discussion is utterly and entirely precluded? What mathematician can ever expect correct results, when the very elements upon which alone correct decision can be based are excluded from consideration. Remembering the conclusions of common law, one would have supposed that the situation of the witness as party might have been deemed worthy of notice, to ascertain whether, from that circumstance, some reason for deduction might not arise? The inquiry might seem worth making. The judge had evidently thought of the matter and his conclusions, after mature deliberation, are, that no presumption should be indulged against the answer, as it would be unjust to compel him to answer, and then judge the answer unworthy of credit, because the answer of a party.

To give to the testimony of a party its just and due degree of reliance cannot certainly be considered unjust. If unworthy of credit, the injustice of so considering it, is not very obvious. All that the opponents of the rule desire, is, that this testimony should receive that precise degree of trust to which it is justly entitled; that, if true, it should be credited; that, if false, it should be disbelieved. The fact of the witness occupying the station of a party should be taken into consideration as one affecting his testimony, but not conclusively. Its effect may be more or less, but it is at any rate worth noticing, and there can be no injustice in considering every fact which may conduce, however remotely, to correct decision. If, as is obvious, there is any difference in the relative trustworthiness of witnesses, then the basis upon which the rule rests fails at once. No reason can be assigned for ascribing undue weight to testimony which might lead to misdecision, without at the same time justifying misdecision, which is its necessary consequence.

At other times the rule has been based upon a supposed equitable principle, "that if the defendant be put on oath *by his adversary*, credit should be given to his declarations, unless contradicted by at least two witnesses, or written documents." An equitable principle! If by equitable be meant a principle established by a court of equity, and therefore equitable—that all rules of equity are therefore equitable—then it amounts to nothing but the child's logic, that it is so, because it is so. But the equity of the rule seems to consist in this, that the party called by his adversary should receive, because so called, peculiar credence.(*u*)

The object of the judge is, or should be, to arrive at correct results; to arrive at such results the truth is requisite. A rule violating all ordinary principles of evidence is established, and the reason assigned, is, that the testimony was called for by the plaintiff. Injustice must be done because the testimony was called for by the plaintiff. A peculiar and extraordinary trustworthiness is ascribed—and ascribed by compulsion—to testimony, not because it is true, or believed to be true, but because it happened to have been elicited at the instance of the plaintiff. This is a new element in the investigation of truth. The testimony of

(*u*) 9 Pick. 212, Farnum v. Brooks.

the witness is true or false, according as it may be required by one party or the other—true, if required by plaintiff—if by defendant, false; so false as not even to be heard. Is the testimony true or probably true? is a question immaterial to the issue; and so utterly unworthy of consideration as not even to be asked. The important question is, by whom is the witness called? as if, because the plaintiff was so unfortunate as to call for testimony, which turns out to be false, that afforded any reason why it should be considered and acted upon as true. The real question is the *truth* of the testimony, and that can only be ascertained by minute and attentive examination of the facts contained in the answer; of their relative probability and improbability, compared with whatever may be obtained from other sources; not by inquiring who called a particular witness. The doctrine of estoppel, odious as it is, affords no valid reason. The judge ought never to be estopped from doing justice. An estoppel should never be interposed to prevent correct decision. The judge should never be compelled for any reason to decide on what he should consider false testimony, as if it were true.

The rule and the reasons of the rule have already been noticed, but so important is it in the administration of justice, that a more minute examination seems required even at the risk of repetition. The answer uncontradicted should obviously bind the parties. When contradicted, then the question of the truth of the conflicting statements occurs; a question only to be solved with any hope of correctness, by an attentive examination of the statements of the witnesses—of their situation and standing generally, and more particularly with reference to the cause, and the several motives, which might reasonably be supposed to influence their several testimonies. In ordinary cases these things are necessary, and the reason is not very obvious why the conflicting statements of parties and witnesses should not be investigated in strict conformity with the ordinary principles of testimony and belief applicable to human conduct generally. To decide in perfect ignorance as to the truth of testimony, but in accordance with the probabilities afforded by the several situations of the witness, might lead to misdecision. An invariable rule, which should say, that at all times and in all cases, a disinterested witness should receive more credence than one interested, would be an improper rule, and either useless or injurious. Every one, the veriest child, knows the effect of interest, and when known to exist, it will naturally be presumed to have influenced, and if it be presumed to have influence, the disinterested witness will ordinarily be considered more trustworthy. So far, therefore, the rule would be inoperative. But when the interested testimony from the high and exalted character of the individual giving it, or from the probability of his statements compared with the testimony of a degraded and abandoned disinterested witness, is seen and acknowledged to be most worthy of belief, in such case, the rule, if adhered to, would lead to inevitable injustice. Every general principle has its exceptions. Pecuniary interest is not the only operating agent; and when it influences human conduct, it may as well act in one direction as another, and even when acting in a sinister direction, may at any time be controlled by higher and purer motives. To

consider it as the only motive, and that sinister, would therefore be erroneous. Directions and cautions may be laid down, but no rule should ever be established requiring the judge to decide without hearing, or contrary to the results of his judgment on the hearing. No rule assuming the uniform and equal action of human motives, however plausible it may be, should ever be adopted—it cannot do good, it may produce evil.

But, as has been seen, equity does worse. It not merely gives judgment without the trouble or delay of investigation, but lays down rules for the guidance of the chancellor, having neither probability nor plausibility to recommend them. All ordinary principles of belief, all the ordinary rules by which others, by which *they*, have been usually guided, are trampled under foot as of no value. Common law by undue mistrust, equity by undue confidence, seem united only as competitors in a common attempt to render injustice triumphant; each striving in its respective sphere to render the chance of correct decision as remote and contingent as possible. As pecuniary interest may be considered as influencing human action, and when a person is in the station of a party, united as it is with the passions, and as when such party is in the wrong, it may be supposed to act in a sinister direction proportionate to his wrongdoing; a directory rule, which, based on these premises, should require reference to these circumstances in all judicial investigations, would obviously be proper. Were the rule even to require, in case of a disagreement between the testimony of a party and that of a disinterested witness, that the latter should always be credited, the rule, though unnecessary in proportion to its correctness, (the same results ensuing without as with it) would still, being in accordance with ordinary experience, in most cases lead to correct decision. Equity, considering a rule like this as leading to incorrect results, has established one directly the reverse, requiring the chancellor, (as has been seen) in all cases of conflicting testimony, to give the preference to the testimony of the party over that of a witness without interest.

If there be any proposition which commands uniform acquiescence in its truth, it is that the self-serving testimony of a party, is inferior in trustworthiness to that of an extraneous witness who has no interest that belief be accorded to or withheld from his assertions. So much more than fully satisfied are judge and chancellor of the truth of this proposition, that they unite in excluding extraneous witnesses, who may have an interest. In the same case the chancellor excludes the plaintiff, who may wish to testify in his own favor. But by this rule, interest is assumed as having no sinister effect; the station of party as furnishing no grounds for mistrust; not merely so, but as affording reasons for great and extraordinary confidence. Were this an isolated decision of the chancellor, after a full and careful investigation of the facts in a particular case, it would be presumption in one ignorant of these facts to contest the propriety of his judgment. But this is a rule imperative and binding at all times, and between all parties. The witness and the party are heard; the extraneous witness may be implicitly believed; yet decision is made as if he were not believed. An invariable and superordinary trustworthiness is peremptorily ascribed to the defendant; and

whether rightfully or wrongfully ascribed it matters not. Were this a decision made after full investigation, though erroneous, it might be pardoned. But it is the decision of another cause and of another age, ordained as a pattern for that of future causes and future ages. Though the decision might be right as between A. and B., what certainty is there that it will be so as between other parties and in different circumstances? It is absurd to consider it a precedent. We arrive at the climax of judicial absurdity when the opinion of a chancellor ages ago is held to be conclusively binding as to the trustworthiness of all future defendants and witnesses. What is it but ignorance triumphing over intelligence? an unnatural joining of the living and the dead after the example of Mezentius?(*u*) Were the legislature to prescribe that the bill and answer should be duly filed; the depositions taken; that every preliminary, however burdensome or expensive, should be gone into before hearing; that the chancellor should hear all the evidence, and receive all the instruction attainable by arguments of counsel, and apply his time and talents to the deliberate investigation of the facts, and that his decision should in the end depend on chance, and be determined by a black ball or white,(*v*) and his decree be given accordingly; such en-

(*u*) Mortua quin etiam jungebat corpora vivis,
Componens manibusque manus, atque oribus ora;
Tormenti genus!

(*v*) "Nec vero hæ sine sorte datæ, sine judice, sedes."
"Quæsitor Minos urnam movet."

Classical and inspired authority coincide in favor of the lot as a mode of settling controversies.

The *aleatory* mode of deciding causes, seems to have tickled the fancy of Rabelais. For "mark," says Judge Bridlegoose, Book 3, c. 39, "that chance and fortune are good, honest, profitable, and necessary, for ending of, and putting a final closure to, dissensions and debates in suits at law, * * my practice therein is the same with that of your other worships, and as the custom of the Judicatory requires, unto which our law commandeth us to have regard, and by the rules thereof, still to direct and regulate our actions and procedures: *un. not. extra. de consuet, C. ex literis, et ibi Innoc.*, for having well and exactly seen, surveyed, overlooked, reviewed, recognized, read, and read over again, turned and tossed over, seriously perused and examined the bills of complaint, accusations, impeachments, indictments, warnings, citations, summonings, comparitions, appearances, mandates, commissions, delegations, instructions, informations, inquests, preparatories, productions, evidences, proofs, allegations, depositions, &c., &c., &c., and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, conform to what has been noted thereupon. *Spec. de ordination. Paragr.* 3, *et Tit. de off. omn. jud. paragr. fin. et de rescriptis praesent, Paragr.* 1, I posite on the end of a table in my closet, all the pokes and bags of the defendant, and then allow unto him the first hazard of the dice, according to the usual manner of your other worships. * * * * That being done, I thereafter laid down, upon the other end of the same table, the bags and satchels of the plaintiff (as your worships are accustomed to do,) *Visum visu*, just over against one another. * * * Then do I, likewise and semblably throw the dice for him, and forthwith livre him his chance. * * When there are many bags on the side and on the other, I then use my small *dice*, * I have other large, great dice, fair and goodly ones, which * * I employ when the matter is more plain, clear and liquid: that is, when there are fewer bags, * * and when all these fine things are done, I give out sentence in his favor unto whom hath befallen the best chance of the *dice:* judiciary, tribunian, pretorial, what comes first: so our laws command."

Lord Eldon commences his decision in the Earl of Radnor, with the remark, "having had doubts upon this will for twenty years, there can be no use in tak-

actments would probably be little complimented for their wisdom. A looker-on would smile at the judicial gravity and patience with which the judge should hear an infinity of discussion which it is predetermined shall not have the most remote effect on his judgment; and the sobriety with which the counsel should read, and the zeal and energy with which they should discuss the testimony, while it was perfectly understood that all this was but vainly beating the air. The idea seems to be ludicrous, and yet, by rendering the chances of correct decision equal, it would be an improvement upon the rule now under discussion. A rule is good or bad only as it leads to right conclusions. Now if interest have any effect, if the station of party have any influence on testimony; then a rule requiring that these effects should never be taken into consideration, a rule the reverse of ordinary experience, would most usually lead to misdecision. Such an one therefore, would manifestly be inferior to the above supposed legislative method.

The peculiar unfitness of the means used to the end proposed, is here as elsewhere strikingly illustrated. The doors of chancery are thrown open for the redress of injured suitors, while the only evidence by which the wrongs sustained can be substantiated, is unhesitatingly disregarded. One witness, unless he can bring his fellow, is excluded; or, what amounts to the same thing, is heard and believed, and decision is made as if he had not been heard, or not believed. No rights can be substantiated, no contracts can be enforced, no justice can be administered, unless the facts in issue can be proved by two witnesses; thus excluding from equity jurisdiction, the very cases, for which it was specially created.

It is not satisfactory trustworthy evidence that is desired, for the extraneous witness may be most implicitly credited in every assertion, and still no more regard is to be paid to his statements than if he had been reputed to be the greatest of liars. Justice is denied unless a given amount of proof can be obtained; and that amount neither necessary nor obtainable. The obligation of contracts is made dependent on the number of those who may be present when they are entered into. Such is the wisdom of equity.

But the *invariable* rules of equity are like the equally *invariable* rules of common law. Accordingly, the force and effect of an answer and the testimony requisite to its disproof, vary with the purposes and objects of the bill. Facts or papers necessary to the institution of a suit, or for the prosecution or defence of one already instituted, may be obtained by aid of a bill of discovery.(*w*) (*x*)In ordinary cases, bills are instituted

ing more time to consider it." "Time," says Bridlegoose, "ripeneth and bringeth all things to maturity: by time everything cometh to be made manifest and patent: and time is the father of truth and virtue." How much would the learned chancellor have been relieved from his eternal dubitations, had he like Bridlegoose, resorted to "the fatal hazard of the dice."

(*w*) In the civil law this sort of proof was not obtainable, on account of its hardship. *Nimis grave est, quod petitis, urgeri partem diversam ad exhibitionem eorum per quos sibi negotium fiat, &c.* Code, 4, 20, 7.

(*x*) At common law it is sometimes obtained by way of motion to produce papers, sometimes not. When it is not obtainable, the reason assigned is the loss of a bill of discovery. 2 Cowen, Rep. 582; 6 Cowen, R. 62; 2 J. C. R. 429; 1 Taun. R. 167; 3 J. C. R. 45; 1 Taun. R. 157, &c.

without the slightest precautions, that the facts therein alleged shall be true. In bills of discovery, the chancellor, for once, wishing to prevent the institution of frivolous or unnecessary suits, requires the oath of the plaintiff to the truth of the facts set forth in his bill. Such oath being made, discovery is granted if his allegations are supported by only *one* witness.(*y*) The question naturally occurs, why this diversity of procedure? If truth be necessary in bills for discovery, is it not equally so in all other bills? If the testimony of the plaintiff be required in these cases, why not in others? Is a defendant any the less trustworthy when only discovery is prayed for, than when a decree is desired? Is he not in fact under less inducement to perjury, inasmuch as in this case, whether by the facts discovered a bill for relief can be supported, or, if it can be, whether it will ever be brought, is a matter of contingency, while in the other, the loss is direct and immediate. Whatever reasons may exist for excluding the plaintiff or for giving extraordinary trustworthiness to the defendant, seem equally applicable to both cases. But a rule without exceptions would be an anomaly in judicial proceedings, strange and wonderful.

The sacredness and extraordinary trustworthiness of an answer have been seen, but this trustworthiness is not coextensive with the answer. Of the same answer the first sentence may be considered true, the second false, according to certain prescribed formulas of the chancellor. "When a defendant admits a fact, and insists on a distinct fact by way of avoidance, he must prove the fact so insisted on in defence."(*z*) Here as elsewhere the authorities clash.(*a*) But the decisions of English chancellors, when corroborated by the profound learning of a Story,(*b*) and a Kent, must be considered as conclusively establishing the law among us. When the answer states two facts, one of which avoids the effect of the other, the one shall be taken as true, the other as false, or what amounts to the same thing, additional proof is required to substantiate the latter assertion. For instance, the defendant acknowledges the receipt of a sum of money for the plaintiff's use, which sum, he says, he has duly paid over. Both facts being apparent in the same answer, one, the receipt, is taken as true, the other, the payment, must be proved. A witness of special trustworthiness stating two consecutive facts, is

(*y*) "When the bill is sworn to, *one witness* is sufficient, for that is not merely oath against oath, but it is the oath of the complainant and one disinterested witness against the oath of the defendant." 1 Cooke, 110, Seavey v. Pernell and al.

(*z*) 2 Johns. Ch. R. 62; Hart v. Ten Eyck, 1 Cow. Rep. 711; Woodcock v. Bennett. The same subject is discussed in 2 Pothier on Contracts, 1568, and in Peake on Evidence, 36; Gilbert on Evidence, 45. A party charging himself in a schedule in his answer, cannot discharge himself by another schedule stating his disbursements. Boardman v. Jackson, 2 B. and B. 385. If the plaintiff is charged by an answer, he must discharge himself by proof, and cannot do it by reading the whole answer. 2 Atkyns, 383.

(*a*) The indivisibility of confessions is ably discussed in 10 Toullier, § 335; Bonnier, Traité des Preuves, § 296.

(*b*) "So far as the answer sets forth new facts by *way of discharge or avoidance* of the matter of the bill, or alleges separate and independent agreements, they are not evidence for the defendant, but all such allegations must be established by proof *aliunde*." Per Story, J., 3 Mason, Rep. 383; Per Kent, Chancellor, 2 John. Ch. Rep. 90.

believed as to one, disbelieved as to the other. The court say that "*he must prove his discharge, otherwise it would be to allow a man to swear for himself, and to be his own witness.*"(c) The chancellor is afraid of the testimony of a party—the very object of whose court was, to obtain such testimony. To swear for one's self, a terrible evil unquestionably. But as to every other fact, is he not equally his own witness? An answer denying facts or avoiding the effect of them by the statement of others, which tend to exonerate the witness, differ not at all so far as the rights of third persons, or those of the witness are concerned. "It would enable him to defeat the plaintiff's just demands by stating evidence in avoidance." Such are the fears of the chancellor, that a dishonest defendant would swear away the effect of his admissions. But if perjury is to be feared, why admit the defendant at all? He may deny, and then the necessity of stating facts in avoidance at once ceases. If the defendant be dishonest, the only effect of the rule is to shift the perjury. For he, who will state false facts by way of avoidance, will hardly scruple to deny true ones by way of bar.

If the defendant be unscrupulous the rule will be little likely to be useful, merely shifting the perjury from one fact to another. If he is honest, then the rule is productive only of pure and unmixed evil. The defendant is compelled to answer; such answer is fully and entirely true; no fact is concealed, none evaded, none denied; yet, of such facts, all being true, a selection has been made, a part adjudged true, the rest false. If the fact of payment be known to the parties alone, by ignoring the evidence of the defendant, misdecision is inevitable. The very integrity of the defendant operates to his loss. It is not contended, that the fact in avoidance should be treated as true, but only that it should be received as evidence, and should be judged of according to its probability or improbability. Those portions of the answer, which are self-serving, should obviously receive a more severe scrutiny than those which are disserving. The whole answer should be taken as an entire piece of evidence, and thus submitted to the consideration of the chancellor.

But here, as elsewhere, distinctions are the order of the day. Had the fact relied on by way of avoidance been stated in the same sentence with the fact which charges, such discharging fact would, for that cause, be considered and acted on as true;(d) if stated in a subsequent sentence, it must be substantiated by proof. Charging and discharging themselves in the same sentence, they are men of veracity; let the intervention of a period occur, and they are liars. So much for the magic virtue of periods. The truth or falsity of an answer is thus made to

(c) 2 John. Ch. Rep. 90. Hart v. Ten Eyck.

(d) In Kirkpatrick v. Trupp & Love, (Amb. 589,) plaintiffs and defendants had dealings as merchants, and on a decree to account, *both* parties were examined. On taking the account, the plaintiffs admitted the receipt of some goods, and in the *same* sentence, said they had paid the defendants for them. The question was whether they were bound to prove the payment; Lord Ch. Hardwick held that they were not, as they charged and discharged themselves *in the same sentence;* but it would have been otherwise had the discharge or avoidance been in a *distinct sentence.*

depend on the collocation of sentences; and the decree is based upon their punctuation. Two answers vary only in the termination of sentences, one defendant is believed, the other disbelieved. The facts are the same, the justice of the case the same, the difference of ultimate decision arises only from the different punctuation adopted by the respective counsel employed.

In like manner reference is had to the *time* when the several facts are stated to have transpired.(*e*) If the fact discharging be stated to have happened on the same day with the fact charging, the defendant is exonerated; if on different days, the defendant must establish his assertions by other proof. Both facts happening on Monday, the whole and entire answer is true. One happening on Monday, as that the money was then received, the other on Tuesday, as that it was then paid over; extraneous evidence is necessary to support the truth of the latter fact; as if the truth of the facts stated were to be determined by the time in which they are alleged to have happened. The unlucky litigant, when informed that his answer was adjudged false, because he asserted that the disbursement was made on a day subsequent to the reception of the money, would ever after take care, if knavish, that, however the fact might be, there should be no lapse of time to ruin his case. If upright, unless he could from other sources verify his defence, he must submit in silence. To insure belief and avoid injustice, all that is required is that the answer should be false.

Upon distinctions like these are the rights of the parties made to depend. To count witnesses, to examine the punctuation, to ascertain dates, and then to have decision ready made to your hands, is a vast saving of labor and reflection, and though it be at the expense of justice, and to the ruin of suitors, so it be done *duly and by rule*, what cares the chancellor? Let us be distinctly understood. The courts do not undertake to decide on the facts as they exist, or are believed to exist. In the one case the defendant's answer, false and so considered, is acted on as true; in the other, though true, it is treated as false. They never investigate. These rules forbid investigation and responsibility. Decision must be given without thought, and the adjudication be mechanical. Such are the vaunted rules of equity.(*f*)

No rules can ever be established by which to judge of testimony unknown and in the dark. Varying, changing, and uncertain as are the motives which influence testimony, similar to the change of motives must be the rule of belief. Any rule marking and defining in advance the precise degree of credence to be given to any particular portion of testimony, if correct, is unnecessary, just in proportion to its correctness; and if incorrect, is injurious just in proportion to its efficiency.

(*e*) A party charged by his answer cannot discharge himself by it, unless the whole is stated as one transaction; as that on a particular day he received a sum and paid it over; not that upon a particular day he received a sum and on a subsequent day he paid it over. Thompson v. Lambe, 7 Ves. 587.

(*f*) The remark of Cicero, with but the change of a word, would be by no means inapplicable now. "*Cancellarius* (*jurisconsultus*) *ipse per se nihil nisi leguleius quidam cautus et acutus, præco actionum, cantor formularum, anceps syllabarum.*" De Oratore, Lib. 1, Ch. 55.

Let then the whole and entire answer be received and judged of by a living judge, not by one, who, so far as competency is concerned, might as well have lived before the flood.

Change now the court; pass from the realms of the chancellor to those of the judge. Parties being excluded at common law, is the answer of the defendant ever received in those courts? Yes, provided hardship, vexation, and expense sufficient are occasioned. A suit being pending at law, if either plaintiff or defendant should wish for the testimony of his opponent, to obtain it, to move even a finger for that purpose, the judge refuses. The dangers and hardships of such testimony, so vividly pictured forth in the reports, amply justify its rejection. He would shudder at the utter prostration of justice, which would ensue. He would fear that the temple of justice would shake to its very centre; that the ghosts of the venerable fathers of the law, aroused by the shock, would come forth from their long repose to forbid such profaneness.(*g*) The common law suit, passing along with its slow and snail-like pace—suppose either party by means of a bill of discovery, should extract the testimony of his opponent, would such answer, thus obtained, be received? Received? certainly, and without the slightest hesitation. Dangers of perjury and the hardship of uttering self-disserving testimony at once cease to exist. Institute an extra suit, double the expenses of litigation and the motives for dishonesty, and the common law judge, who has so great a dread of the voluntary and involuntary testimony of the party, receives it without the slightest objection. If offered or called for in the same suit, he refuses it; imposing an indefinite burden on the parties, the same judge receives the same facts to be used between the same parties and in the same case; and this when the reasons for his original rejection, if valid, are here applicable with increased strength. Will not his own rules estop him? The judge, like the chancellor, is or is not trammeled by rules and principles, as the whim of the moment governs.

This same answer, now admitted at common law, produces entirely different effects upon the rights of the parties from what it would have done in equity. Being received at common law, no such peculiar and unmerited credence is given it, as to require two witnesses to disprove the assertions therein contained. The admissions and avoidances are all received as evidence, and to be so treated.(*h*) If the answer should be contradicted by one witness, the jury are at liberty to decide between these opposing statements. Whether the several facts charging and discharging are true or false, whether the answer is true or false, are questions they there permit to be decided after hearing. From these different rules it follows that the same answer is evidence or not evi-

(*g*) It seems that on trial at common law of a case sent from chancery, the defendant may be examined and subject to cross-examination by the plaintiff, although called as his witness, his situation being necessarily adverse. 1 Ryan & Moody, 126, Clarke *v.* Saffery. Such the uniformity, the certainty of the law.

(*h*) When an answer in chancery is given in evidence in a court of law, the whole answer is read, and it is received as *prima facie* evidence of the truth of the facts therein contained, subject, however, to disproof. 1 Caines' Rep. 157. 11 Johns. 260.

dence, that the same statements are true or false; not, as should seem probable, from investigation or reflection, but that these conclusions are dependent upon the fact whether the answer is read to a jury or a chancellor. In the case in and for which the answer was obtained, the same statements are acted upon as true or false, which between the same parties in another case, receive a consideration precisely opposite; so that on precisely the same evidence judgment may be to-day for plaintiff and to-morrow for defendant, and the only earthly reason assigned for the difference is, that the judge, who thus differently weighs it, has in the mean time changed the title of his office, and the name of his court. The same thing is to be and not to be; to be, before the judge, not to be, before the chancellor. Thus the same individual magistrate, when the same rights of the same parties are at issue before him, will refuse evidence, of which, under a change of name, he will compel the production; when it is obtained, as judge he will believe it, as chancellor he will disbelieve it; with one name, on the same testimony, he will give judgment for the plaintiff, with another, for defendant.

This difference of treatment which the answer receives at equity from what it receives at common law, is stated in the books to arise from the distinction between pleading and evidence. At equity the answer is considered as pleading, and the facts asserted by way of avoidance must be proved; at common law the several facts asserted in and by the answer are considered as admissions of the party and consequently evidence; these different results arise from this distinction.(*i*) The answer, it is said, is mere pleading in equity, and the facts stated by way of avoidance or discharge require proof. Pungent pleading that, which gives more credit to the answer of a party on oath than to a disinterested witness. If it be mere pleading, and unavailing in equity, why should it receive such an accession of trustworthiness at law? If it be but pleading in equity, the words in the paper remaining unchanged, by what necromancy does it at once become evidence? If it be evidence at law, why not equally so in equity? The sole reason for this difference is found, not in things, but in words. "To-day I preside in a court of equity," would be the answer to the inquiring suitor who might wish to know why his assertions yesterday considered as true were to-day disbelieved. "They call me by different names, and as they change my names, so change I my opinion of your testimony."

From the utter incompetency of common law to do justice, the more important and complicated suits are at once thrown into the courts of equity. The more valuable and important the rights of the parties are, the greater are the evils of misdecision; the more numerous the parties,—the more numerous are the percipient witnesses, and the more necessary is it, in case of diversity of statement, that their several testimonies should be forthcoming for the thorough elucidation of the matters in dispute. In the case of few parties, and where there is little of complexity, the importance of general admission has been seen; increase the number of parties, and the extent and complication of the cause, and the pro-

(*i*) Vide cases before referred to. Woodcock v. Bennett, 1 Cow. Rep. 743. Ten Eyck v. Hart, 2 John. Ch. Rep. 89. 2 Evan. Poth. 157. Peake 87.

priety of admission is proportionally increased. Where there are numerous parties to a suit, whether plaintiffs or defendants, or both, let us examine the rules adopted. In case of one plaintiff it has been seen that his testimony is in no way admissible; enlarge the number to any extent, still the rule remains unchanged. The same reason which excludes one excludes any number, however large. Where there are numerous defendants, the first question which occurs is whether a codefendant is examinable at the instance of the plaintiff, and to the intended and expected disservice of another codefendant. Against themselves and for the plaintiff's benefit they are each liable to examination, no matter how great the hardship may be. Against each other can the plaintiff compel the testimony of any of the defendants? *Yes* and *no* seem to be the proper answers: *yes*, if by so doing he will release all claims against the witness introduced; *no*, if he still wishes to enforce his claim.

"The plaintiff, by examining defendant as a witness, precludes himself from obtaining any relief by decree against him; and if, from the nature of the case, the defendant would be primarily liable, and another defendant only in a secondary degree, the plaintiff has lost his remedy entirely."(*k*) So that if the plaintiff have claims against several codefendants, and the testimony of one be necessary to substantiate the case as against another, and such defendant, whose testimony is desired be solvent, he must either lose his cause through defect of testimony, or, if by examining the defendant he obtains the desired proof, incur the risk of losing all beneficial results from his testimony by releasing the solvent defendant. If the defendant's testimony be proper as against himself, is it not equally, nay, much more proper as against another defendant, for whose interests he must obviously feel less than for his own? The reasons which in his own case required the production of his testimony, equally exist in this, while the objections to the admission of a codefendant's testimony are diminished just in the proportion which exists between the interests one feels in himself and in his neighbor.

"If the plaintiff has replied to the defendant's answer, it seems he cannot be examined, for it cannot then be said he is not interested."(*l*) So that if a codefendant is called as a witness, he ceases to be a party; and if examined as a party, he ceases to be a witness.

The defendants being numerous, are they mutually examinable for each other, and against the plaintiff or another codefendant? "The rules as to evidence are exactly the same in equity as at common law." Such is the law as laid down by one of the ablest of the English chancellors;(*m*) and so follows on the file of his successors, each repeating the response of his predecessor, and at the same time directly contradicting it. Were the remark true, chancery would never have existed; though notoriously not true, it is still laid down as the law. Were it true, the answer would be easy; not being true, it becomes a question of difficulty.

(*k*) Thompson v. Harrison, 1 Cox, 344. (*l*) Winter v. Kent, Dick. 350.
(*m*) Per Hardwick, 1 Atk. 453, Manning v. Lakeman, and 2 Atk. 453. "It is repeatedly asserted, by courts of equity, that the rules of evidence are the same in those courts as in courts of law." Per Parker, C. J. 17 Mass. 324, Dwight v. Pomeroy.

In equity as well as at common law, it being in the power of the plaintiff to make as many defendants as he may choose, it is of course in his power to deprive the defendant entirely of all proof by summoning his witnesses as codefendants. To prevent such disastrous results, the chancellor permits a defendant to be examined for a codefendant.(n) The reason for the admission is satisfactory and equally applicable to both courts; but at law the rule is diametrically opposite, the asserted identity of their rules to the contrary notwithstanding. The evils of exclusion, the benefits of admission, being the same, why this diversity as between courts?

In the case of Lee v. Atkinson, the defendant was "*admitted saving just exceptions.*"(o) What are just exceptions? Is he examinable unless interested? if interested, neither voluntarily nor involuntarily to be examined. A party without interest—(at least to get rid of his case, if he has no other interest) is hardly a conceivable case; inasmuch as the slightest initiation into the mysteries of equity, is attended with an amount of fees one would think sufficient to create interest, if it can so be created. What constitutes interest is a matter of uncertainty; on its being determined to exist in the defendant, he is excluded. He is interested in his own case directly, in that of his codefendant, but collaterally—the reasons for exclusion seem to decrease with the consequent diminution of interest. If it be necessary that justice should be administered at the expense of one defendant, it is equally necessary that it should be so at that of another; and if self-serving testimony should be extracted to the disservice of one's self, it should be equally so, to that of a third person.(p)

So too a defendant, charged with fraudulently colluding(q) with a codefendant, is not heard. The legal presumption of innocence is rebutted by counter presumption of fraud; of fraud without proof, save the mere assertion of the bill, and which may have been made for the very purpose of excluding the testimony of this defendant.

When and in what cases either the defendant or his answer is received, can never be foreseen. The most learned judicial astrologer can only predict. For what purpose, then, shall we penetrate farther into the utter chaos of chancery, where we find neither certainty nor consistency.

We would, then, be understood literally in asserting, that the law of evidence, so much lauded by those whose vocation it is, to praise all existing institutions, is in the worst possible condition, uniting in the

(n) "Ground of permitting a defendant to be examined for a codefendant, is, that the plaintiff might unite distinct claims with a view of depriving the parties of each other's evidence." 2 Ves. & Beam. 405.

(o) An order to examine defendant as a witness *saving just exceptions*, is an order of course, &c. 2 Cox, 413, Lee v. Atkinson. Order to examine a party saving just exceptions, of course on the suggestion of no interest; if an interest appear, refused. 18 Ves. 517, anon.

(p) Interest is highest in parties; objections against interested testimony in the case at its *maximum;* yet they are received. Interested extraneous witnesses, who cannot have more interest; who may have equal intelligence and whose testimony may be equally important, are rejected, and that by the same magistrate, who receives the party.

(q) 3 John. Ch. R. 612, Whipple v. Lansing.

highest degree the evil of discordant and uncertain law.(r) By excluding great masses of testimony, by extracting it in the worst possible mode, and by establishing the most dangerous and absurd rules of judging of the evidence received, as far as can be, they render misdecision necessary and unavoidable. The whole subject is a scene of "confusion worse confounded." The great courts of law and equity proceed in different and opposing courses. Both cannot be right. Each may, to a certain extent, be wrong. Nor is this contrariety between court and court enough. In each of these courts, exceptions utterly subversive of their very elementary principles, are adopted. Inconsistent with each other, they are equally at war with themselves. The general principle, as has been seen, is broken in upon by exceptions utterly at variance with, and destructive to it. Necessity is the great reason for this violation; the golden and invariable rules are so bad that it was absolutely necessary that they should be violated; and this, when the danger was at its *maximum*. Under the most inauspicious circumstances for innovation, they have abandoned these general rules; and if rightfully, no reason can be given why they should longer subsist.

But notwithstanding the extent and variety of their innovations, the united action of the two great courts of equity and law, with the most efficient and energetic co-operation, are unable to effect, what should be a primary and indispensable step, the introduction of the parties with full liberty respectively of making a full statement of the case themselves and of cross-examining their opponents.

The courts ought to go to the fountain head, and hear the statements of those best acquainted with all the facts; hear, but receive them with all due caution. They ought to cease from hearing cases by the halves, and hear all the evidence obtainable from every source, and then judge for themselves, and not with the judgment of others living ages ago. Let them decide *by*, not *contrary to*, the weight of evidence. Let them decide as they honestly believe, and then if they are wrong, their errors may be pardoned; not contrary to their own opinion, when even correct decision, the result of accident, is not a subject of approbation. Such are the rules, which reason and experience dictate, and which equity and common law daily and hourly violate.(s)

(r) An intelligent writer (2 Evans, Pothier, 210,) in defending the contrarient practices of these several courts, remarks, that they have their several advantages and disadvantages, and that pursuing your remedy in either, you must take it with its accompanying advantages and disadvantages. The disadvantages, it seems, must be retained. The idea seems never to have occurred that it would be the course of wisdom to lop off the disadvantages as worse than useless excrescences, and retain the advantages. Equity has the advantage of the testimony of the party, common law that of cross-examination. No reason can be given why these advantages should not be united in each court, and the several disadvantages relinquished. The slave, whose feet are in fetters and he whose arms are in chains, have each advantages and disadvantages for labor, but the master whose object it was to obtain the greatest benefit from their services, would hardly think it advisable to retain what would impede their labor.

(s) Different States, as the evils of exclusion become more and more apparent, carve out exceptions and modifications of the rule suggested by the hardship of some particular case. Virginia has recently given common law courts the power of extracting testimony before obtainable only by equity. A further improvement would be, to increase the powers of equity and to change and alter its rules.

CHAPTER VII.

ADMISSION OF PARTIES IN CRIMINAL PROCEDURE.

THE end, alike to be attained in civil or criminal procedure by the introduction of testimony, is the ascertainment of the truth; the extraction of the whole portion of facts connected with a given litigated question. The reasons, which show the importance of the admission of the testimony of parties in civil, show still greater necessity for it in criminal causes. Necessary as has been seen to be the admission of parties in civil procedure(*a*) to induce or prevent the imposition of just or unjust pecuniary liabilities; this necessity is immeasurably increased, when the onerous inflictions of penal law are to be imposed or avoided. Here then, the question acquires a proportionably commanding importance—and is to be discussed with still greater caution.

In the investigation of truth, the eye of intelligence refers only to the fact in issue. The resulting effect of such fact is, such as the law has seen proper to ordain—and its provisions are to be considered as the best possible. The best means of ascertaining the existence of any facts is simply a question of evidence. The escape of innocence, the punishment of guilt, are the only ends to be attained, and the rules of evidence are, or *should* be, adapted to their most effectual attainment. Whether such rules have been adopted, is the subject proposed for consideration—a subject commensurate in importance with the due administration of penal law.

In all cases, were the judicial investigator to pursue the course dictated by reason, he would obviously anticipate the fullest information from those best acquainted with all the facts. The eye and the ear witnesses—the accidental spectators of the transaction—*may not*, when the matter comes up for judicial investigation, be the most accurate, the best witnesses. Their senses may have been deceived—their recollection may have become dim, confused and uncertain—or their memory may have failed. An adequate motive to perceive, treasure up, retain and relate what has transpired, may have been wanting. They may have ceased to exist, or their presence, for the purposes of judicial investigation, may be unattainable—or attainable only with great and undue trouble and expense. The crime, perhaps, may have been committed without the presence of any human being. Not so with the parties to the transaction. The actual participators, the actors in the scene, will always be

(*a*) There may be much repetition of the argument, but we must be pardoned that fault.

present—and the same interest, which induced them to act, will always induce them to recollect. Were the transaction one of recent or remote occurrence—where the rights of persons or property were violated—the reputed sufferer in those rights would best know(*b*) when, where, how, and in what he may have suffered. The accused, the reputed violator of those rights, would know whether the charge was true, and if true, the precise manner, extent and mode of such violation. They, then, the injured and the injurer, would obviously, so far as accuracy of original perception and recollection are desirable qualities in a witness, be the best sources for instruction. Any supposed danger from want of integrity on their part, or of intelligence on the part of the judge, will hereafter be examined.

Now the evils of exclusion are obvious. Were all testimony excluded, the detection of the criminal would be impossible. To the extent of exclusion—so far as from that cause crime escapes detection—to that extent it is encouraged and rewarded—by receiving and retaining in safety and without molestation its fruits. Impunity is the necessary and inevitable result of insufficient proof. Partial exclusion is partial impunity. When this deficiency of evidence is the result of exclusionary rules, the law aids and abets the criminal. It does on a grand, what the perjured withholder of facts does, on a small scale. Suppression, on the part of a witness sworn to disclose the whole truth, is perjury. The law thus punishes the witness for following with strictness its own spirit. Exclusion of testimony; suppression of the truth are its grand characteristics, punishable in the case of a single individual; when infesting every portion of the law, approved as one of its most important rules. The witness who from feelings of compassion,(*c*) in a single case suppresses the truth only follow the example of the law. Suppression either by the law or by a witness differs only in the extent of the evil inflicted. In the one case a single individual may suffer unjust or escape just punishment; in the other, the evil pervades the whole community. He then, who, wishing to see the law enforced, adopts exclusionary rules of evidence, most effectually prevents the accomplishment of his own wishes.

No line of distinction can with safety be drawn between the rules of evidence in criminal and civil procedure. Whatever, in the one, illustrates the truth, cannot fail, of being conducive to similar results in the

(*b*) In some conceivable cases, of course a violation of property, as larceny may have taken place, and the individual may not know so well who committed the crime as some other person, but still the argument remains in undiminished force in all cases, when he does know. The violator of the rights of others always knows, however reluctant to relate.

(*c*) Whether a criminal escapes by reason of exclusionary rules, or the law should in certain cases authorize and prescribe perjury, would be a matter of form merely, not of substance. The English law adopts one, the Hindoo law the other course. The evil, however, is of limited extent in the latter, while in the former, it extends throughout all its domains. "Whenever a *true* evidence would deprive a man of his life, in that case if a *false* testimony would be the preservation of his life, it is allowable to give such false testimony: and for ablution of the guilt of false witness he shall perform the *Poojeh serashtie:* but for him who has murdered a Bramin, or *slain a cow*, who being of the Bramin tribe has drunken wine, or has committed any of those *particularly flagrant* offences, it is not allowable to give false witness in preservation of life."—*Halhed's Gentoo Laws.*

other. Reform in the existing law being the object, an examination of the law as it is, in its several subdivisions, becomes necessary. Not enough is it to notice the *bizarre* and incongruous state of any portion considered by itself; but its relation to other branches must be considered, for its absurd and contradictory provisions can only be seen by contrasting one portion with another.

In criminal suits, then, as in all others, there are always two at least, who have an interest in the result: the prosecutor and respondent; the party inflicting, and the party receiving the injury. Though the suit may be in the name of the government, yet the real moving mind, the inspirer of the whole process, is generally the party who purports to be injured. The prosecutor, when not the party injured, has still an interest of some sort; else, why does he assume the oppressive expenditures and onerous labors of the prosecution.(*d*) Either ill-will or a pecuniary interest must ordinarily have induced the prosecution; and to the vision of an unlearned man, the former would be regarded the most likely to lead the witness astray. The prosecutor, whether he be the party injured or not, has at any rate, in the cases to be cited by way of illustration, a pecuniary interest; and in all cases an interest of some sort. In civil causes, the effects of pecuniary interest have been deemed so deleterious, that the sagacity of the judge has always been on the alert to detect its presence even in the minutest degree. In criminal procedure, the dangers to be guarded against are greater in proportion to the greater importance of the rights involved. It remains then to examine the consistency of this portion of the law.

In cases of theft, the prosecutor is entitled to restitution of the goods stolen on conviction of the offender,(*e*) and in all cases his civil remedy is in abeyance until the result of the criminal prosecution has been ascertained. Conviction then is either absolute success, followed by the attainment of the possession of the goods stolen, or a necessary prerequisite(*f*) to any well-grounded hope of success. Whatever interest as plaintiff in a replevin suit, the prosecutor might have, the same he obviously has in the issue of the criminal proceedings. Whether he were to obtain the goods directly or by the intervention of a second suit, he would still have an interest in the result of the prosecution. Because the process is termed indictment, rather than writ, his interest

(*d*) In the English law, the prosecutor, in a vast many cases, is himself responsible for the costs; which in some instances are so burdensome as almost to amount to a denial of justice. 1 Chitty's Crim. Law, 486, 671. Lord Brougham, in his speech on Reform of the Law, states an instance, when prosecutor's costs were £10,000; p. 58.

(*e*) One or two instances, by way of illustration, whether of common or statute law, it matters not:

"The prosecutor is competent, notwithstanding he be entitled to a restitution of his property on conviction of the thief." 2 Russ. on Crimes, 602.

"So one from whom goods had been stolen is a competent witness on the trial of the thief; although he is entitled by statute to satisfaction from the *future* earnings of the convict, and a recompence from the public treasury for the expense of prosecution." 9 Mass. 30, Com. *v.* Moulton.

(*f*) Before conviction of the felon, no *civil* action lies at the suit of the party injured for goods stolen. 2 D. & E. 751, Harwood v. Smith. 3 Greenl. 459, Foster v. Tucker et al. 4 Greenl. 164, Boody v. Keating.

in the property will not on that account be any the less. A., receiving a stolen horse, by the verdict of a jury, receives the same value, whether he be termed prosecutor or plaintiff, and his integrity can hardly be supposed to be materially affected by this change of name.

"In civil cases, if a witness be interested, he cannot be examined. In criminal cases, for the *safety of the public, getting rewards* does not in a court of criminal jurisdiction disable a witness from giving testimony, though it may go to his credit."(*g*) Abundantly, yes, superabundantly aware of the sinister effect of interest, yet not satisfied with its natural existence, the legislator must go out of his path on an errand of crime to foster its increase by artificial means. Those, then, to whom neither revenge nor passion; neither regard to the laws nor their duties as citizens, would be adequate inducements to prosecute, are to be bribed by pecuniary offers to testify. The interest in the reward thus proposed as the result of accredited testimony, how differs it from any other sum of similar magnitude? Let a hundred dollars be at stake in a civil or criminal suit, and in what would the difference consist. Is the informer's money less valuable? Does it pay purer debts?

> "Sound it; it doth become the mouth as well:
> Weigh it; it is as heavy."

"*For the safety of the public.*" A good reason for admission or exclusion. The safety of the public requires interested witnesses. But if the common law has any one principle established and confirmed by the uniform current of authorities, it is, that perjury is the certain and inevitable result of interest. Yet, notwithstanding its own rules, is this evidence received. The safety of the public requires evidence prejudicial to its best interest. If this danger be sufficient for exclusion in civil, by how much is it diminished, when the interests involved are immeasurably increased. Here, as every where else, change only the name of the suit, while the beneficial results enure to the same individual, and he is accordingly received or rejected. Reason for the distinction? All the truth-destroying effects of interest vanish; it becomes *pure*, sublimated, etherial, untouched, and unstained by aught that is gross or worldly, when the remedy is sought for under the name of the king, or state. Let those eternal litigants, John Doe and Richard Roe, but enter the arena, and the responsible mover of the process is excluded; seeking to attain the same ends under the name of the king, or state, he is supposed to have done it, "*in pure maintenance of the laws and public justice;*"(*h*) and is received. The calm mind of the informer is never swayed by sinister interest, or, it may be, that the atmosphere of the criminal side of the King's Bench exalts and purifies it above the influence of all earthly thoughts and passions.

Inconsistent as is the admission of the informer and prosecutor with

(*g*) Per George, B., in King v. Geo. Leary. McNally on Evidence, 62.
It is the constant practice to admit the *prosecutors* in an indictment for highway robbery, &c., &c.; though *entitled* to a reward. Esp. N. P. 713. Informers, whose evidence receives a pecuniary compensation from the law, are *not* admitted by the code of Napoleon.
(*h*) Gilb. Evidence, by Lloft, 221.

the general principles of common law in civil, it is none the less so with those adopted in criminal procedure. Intelligent as a witness as may be the prosecutor or party injured, the accused is in nowise his inferior; and the reasons which justify the admission of one, would seem equally to authorize that of the other.

Is then the accused *at his own* instance received? A crime has been committed. In the absence of all proof no greater presumption exists, that A., rather than B., has committed the offence. None can exist. The judge can have none. He should proceed to the investigation for the sole purpose of ascertaining *who* may be guilty. Who may in truth be the injurer or injured, does not appear, nor should it be presumed to appear, from the relative situations the parties may respectively bear to the cause on trial.

Were the law to look with an equal eye on the accuser and the accused, it would form no presumptions in advance, either as to the truth or falsity of the charge alleged. It would leave the result as a matter for subsequent decision, after all the light receivable from a full and complete investigation had been obtained. It would neither assume the truth of the charge, nor the innocence of the prisoner. The mind of the judge should be neutral. To assume the truth of the charge would be to the injury of the accused; it would be anticipating the most criminative evidence. To assume the innocence of the accused, would be to pass judgment upon the truth of the charge, and the veracity of the accuser. No presumptions should be formed. For if done, it is, to the extent of such presumption, an interference with judicial action; a prejudice assumed without cause; a commencement of the work of investigation with a mind unfitted for the task, from preconceived opinions; from judgments preceding even the means of knowledge, and which, whether right or wrong, are only so from accident. If this be correct, by what process of reasoning can the course of the common law be sustained?

There the innocence of the accused is a presumption of law;(*i*) a presumption of the practical effect of which in the trial, an observer in criminal cases alone is aware. Innocence of the accused, then, being a presumption of law—the accusation in the outset being *presumed* untrue, the accuser's statements false, whether intentionally so or not is immaterial,—the question would naturally arise, whether both, and if not both, which of the two, should be heard as a witness.

The principle of impartial neutrality—blind justice, holding in her hands the *even balanced* scales, without prejudice for or against the accuser or accused, would require, that each should be heard. With equal means of knowledge, with equal power to instruct, with motives to truth dependent on their relative situations—motives, whose existence and tendency being seen in advance will be little likely to deceive—both

(*i*) In the Scottish law, the presumption was of guilt. "He who of his conscience cannot cleanse or find innocent, he must of necessity find guilty." In other words, he must be presumed guilty; and if the jury are not convinced of his absolute innocence, he must be condemned. Pitcairn's Crim. Trials, 19 West. Rev. 167.

should be heard and *believed*, (for truth being oftener found to exist than falsehood, by the greater frequency of its existence, by so much greater is the presumption of its existence,) *until*, from comparison of their several statements, reasons for belief or disbelief shall be found. A selection of either, would be an infringement of the proposed neutrality of the judge.

But the common law selects. Whom? The accused, presumed innocent? No. The accuser, presumed a perjurer, alone is heard. The accused, for whose benefit such favorable presumptions are nominally made; the accused-innocent, is rejected. It becomes then necessary to examine the reasons given for the admission of the *voluntary*, *self-serving* testimony of the informer or prosecutor, to see if these reasons do not equally justify the admission of the accused.

"The superior interest, which the public have in the punishment of offenders, produces a *striking difference*, for the party aggrieved is allowed to give evidence *against* the prisoner, though he is frequently permitted by *restoration* of stolen goods, by *rewards*, by *reimbursement* of costs, or *other* means, to *derive a benefit* from conviction. *No* injustice need, however, arise from this exception, which has been found essentially *necessary* for the purpose of *public justice; because* the credibility of the witness is still left to the jury, and they are *able* to estimate the *probable* influence of *interest* or revenge on the testimony, which he delivers."(*k*)

Whatever "*superior interest*," the public may have in the punishment of offenders, if their own maxims are of any force, they have a much *superior interest* in the acquittal of innocence. Much as public justice may require interested testimony to prove the truth, much more does it require the same testimony to prove the falsity of the charge, if untrue. "*No injustice need arise, because the credibility of the witness is left to the jury, and they are able to estimate the probable influence of interest.*" If the accuser can be safely heard, why not the accused? If the jury, "*is able to estimate*" the credibility of the one, why not of the other? What darkness has thus suddenly obscured the intellectual vision of the jury, that with ability to decide correctly on the testimony of the prosecutor, it should suddenly fail, when that of the prisoner's is to be investigated? Is the credibility of one, a matter so easy; the other, of so difficult decision? Does *interest* vary its effects on their respective testimony? If nay, then whence this inability to decide? If yea, cannot they estimate the effects of this variation? Is the intelligence of a jury subject to magnetic influences; *positive* and competent for decision, when the interest of the prosecutor—*negative*, and incompetent, when that of the prisoner is to be estimated? "It *concerneth the community*, that crimes pass not wholly unpunished, and if the party suffering might not prosecute, few besides have the certain knowledge of the fact or the disposition of bringing it to trial."(*l*) Here then may be seen, at last, some slight symptoms of reference by the court, in their reasoning, to the real purposes for which courts are instituted. The reason a good one, why

(*k*) 1 Chitty, Crim. Law, 556. Am. edition, 453.
(*l*) 1 M'Nal. on Evidence, 54.

not elsewhere adopted? Does it not *concern the community*, that innocence should escape, that they who have committed no crime, should suffer no punishment? As few, besides the prosecutor, might have the knowledge or the disposition to prosecute; so few, beside the accused, might have the knowledge of those facts, which constitute a defence. Though by "*indictment of law*," the informer or prosecutor, is presumed to come "*in pure maintenance of law and public justice*;(*m*) yet, as it may happen, that interest, or revenge, or malice, may have induced the prosecution, would not the testimony of the prisoner be as important, as that of the prosecutor?

These reasons, it has been seen, favor equally the admission of prosecutor and prisoner. To reject either, is to decide without knowledge on the character and trustworthiness of *unheard* and *unknown* testimony. In the absence of all legal presumptions, *each* should be heard.

But the innocence of the prisoner is a presumption of law. The innocent person presents himself before the judge and demands a hearing.(*n*) Who dares to exclude the innocent? Being innocent, he is without motive to falsehood. His answers, being true, cannot deceive. Inasmuch as he has no fears that any possible confusion or agitation of his may be injurious, others certainly need not be alarmed. Having such fears, his obvious course would be, not to offer his own testimony. Being innocent, and his testimony true, proper credence may or may not be given it. True. But as all testimony may be misjudged, there is nothing peculiarly alarming in all this. But this result is not to be anticipated. The prisoner innocent and admitted, the means of right decision are within the power of the court; innocent and rejected, those appointed to decide have no longer even the means of arriving at correct results. Innocent and believed, justice, the end of all judicial proceeding, is done. Innocent and *disbelieved*, no evil has ensued by the introduction of the testimony, as without it the same result, with still greater certainty, would have happened, while, at all events, a chance for correct decision has been obtained; a chance important as is the probability which truth has for credence over falsehood.

The innocent may utter falsehood. If he does this voluntarily to incur punishment, it is nothing more than now he may do, by pleading guilty to an unjust accusation. If, for the purposes of self-defence, he utters falsehood and thereby escapes, still, as a just judgment has been rendered, no very alarming evil has ensued. Justice by falsehood is better than injustice by the same means. But as falsehood will be little likely to present itself to the honest man as means of escape, its existence in the case supposed is by no means to be presumed.

He, then, who would exclude the innocent must assume, as the founda-

(*m*) Gilb. Evidence, by Lloft, 221.

(*n*) In the old Hebrew law, it would seem, both parties were heard. "The accuser and accused both made their appearance before the judge or judges. . . . . The accuser was denominated *Satan*. . . . The witnesses were sworn, and in capital cases the parties concerned." Jahn's Bib. Archaiology, 306.

So in Greece. . . . After these preliminaries in all cases, the *parties swear to speak* the truth, and begin personally to discuss the case. 2 Anacharsis' Travels, 261.

tion of his argument, the dangerous tendency of innocence to truth, and of truth, as a mean of correct decision, to the cause of justice. The lips of innocence are to remain forever sealed, lest perjury and lies should escape. Perjury anticipated from the presumed innocent; truth from the presumed perjurer. Such is the assumption upon which the exclusion of presumed innocence must necessarily be based.

But the accused may be guilty, and, being guilty, may testify falsely to screen himself. True, but at the bar of his own conscience no guilty man ever escapes.(o) The dangers and the hardships of examination being such as by the common law to excuse the defendant from interrogation, will the accused voluntarily incur, nay, court those dangers? Guilty, would he voluntarily expose himself to examination? But what if, relying on his own hardihood, he should? Guilty, he is exposed to all the dangers which have been considered sufficient to exempt him from any answers. Guilty, every true answer, by its truth, every false answer, by its inconsistency with the true ones already given, leads to conviction. Guilty, and answering falsely, his situation as accused would induce no peculiar faith in his answers. There is indeed less danger of crediting a perjured party than a perjured extraneous witness, inasmuch as the interest, being more obvious, will be less likely to deceive. Guilty and a perjurer—contradicted by the accuser, by the witnesses, if any, to the transaction, by the circumstances of the case, his conscience unquiet—the chance of undue trust would hardly seem very great.

But suppose him believed. It is only the case of false evidence believed, a danger to which all false evidence is exposed, but a danger only to be averted by omniscience, and therefore affording no grounds for the exclusion of testimony *not* known to be false. Were it *known* to be false, its introduction would obviously be harmless.

In the case above considered, the accused has offered his own testimony, *self-serving* of course, else he would hardly have offered it. But as, if guilty, he will be little likely to do this, shall he, when, as a measure of safety, he would withhold this testimony, be compelled to answer such questions as may be propounded by the court or by those hostile in interest to himself?(p)

The principles of common and constitutional law alike throw a protection around the accused. *Nemo tenetur seipsum accusare*, translated into our own language, has been inscribed among the constitutional provisions of the land. The learning of the courts and the prejudices of the people have both conspired to give to it a peculiar sacredness. It then becomes necessary to examine its meaning, its effect, its expediency, and the arguments which have been assigned in its support; for, sanctioned as it has been by the wisdom of antiquity,(q) the advocate of in-

(o) "Prima est hæc ultio, quod se
Judice, nemo nocens absolvitur, improba quamvis
Gratia fallaci Prætoris vicerit urnâ."—Juvenal, Sat. xiii.

(p) No constitutional objections exist to allowing the accused to proffer his own testimony. When thus offered he would be subject to cross-examination like any other witness. This is now advocated in England, by Lord Brougham and other distinguished jurists.

(q) The early state trials show that this was not the original, primitive common

novation must show a strong claim for change, before he can expect or even hope for a hearing: he must examine the question in all its bearings; he must erect, on solid and immovable foundations, the superstructure of his argument; for he has the prejudices, which cluster around whatever is—the fear and danger of innovation—and the cries of the rack or torture—to encounter in his attempts at reform.

The idea of compelling a witness to prefer charges against himself was never thought of; and the constitutional provision was never intended to guard against any such imaginary danger. The object was to protect entirely the prisoner from any interrogatories adverse to his own interest.

Should, then, the accused, when his own interests are at stake, in his own cause, in his own trial, against his wish, and for the avowed purpose of establishing his guilt by his own answers, be compelled (r) not by the rack or torture, but by the ordinary process of court, and under the ordinary penalties for perjury, to answer any and all pertinent questions relating to the cause on trial, which may be proposed either by the prosecutor or the court?

The objections to this testimony will come either from the prosecutor, the accused, or the judge.

On the part of the prosecutor, by whom and at whose instance the questions have been propounded, no objection can, of course, arise. Having ample evidence to subserve his purpose, he will never call on the prisoner; without such evidence, he may, from necessity, be obliged to do it. Not desiring this testimony, his obvious course is not to require it; requiring it, any objection comes with an ill-grace from his mouth. On the part of the accused, the form which his objection would assume, the course which he would adopt, would depend much on his innocence or guilt.

The accused innocent, he would rejoice at such a rule. To dissipate the clouds which encircle and surround him; to expose, detect and refute the false and calumnious charges, which have been made against him, would be to him a source of pride. Innocent, he would rejoice at an opportunity of stating, under the most solemn sanctions, the several exculpatory facts by which such innocence would be proved. To him interrogation brings no terrors. To the guilty alone is it a source of dread. Every true statement of his, receiving corroboration from other sources, would induce reliance upon his statements. Innocent, and whether his answers are or are not credited, still he suffers not by this interrogation; as in the worst event, the same result would unquestionably have happened in their absence.

law of England. The prisoner was frequently, and even as late as the reign of Elizabeth, subjected to the rack, and those whose office it was to handle it were "charged to use it in as *charitable* manner as such thing might be." In 1614, Peacham, accused of high treason, was examined upon interrogatories "before torture, in torture, between torture, and after torture," by a commission, of which Sir Francis Bacon was a member. To show how and when this change was introduced would, had we leisure and the necessary materials, be a labor of great interest.

(r) The prisoner should be received and examined like any other witness; compelled as far; examined under the same penalties as any other witness.

But the innocent may be confused, and such confusion may lead to unjust conviction. Confusion, the natural accompaniment of guilt, is a reason, not for excusing, but rather for requiring the testimony of the guilty. As the innocent may be confused, lest improper inferences may be drawn from this confusion, all, says the law, out of regard to the innocent alone, should be exempted from interrogation. The danger here apprehended applies only to the innocent.

Confusion is the result of consciousness of error or mistatement, or inconsistency. The truth is one, uniform, consistent with itself, with every other fact in the case. Ordinarily, what reason can exist for confusion on the part of the witness uttering the truth. Hesitate he may, falter he may. The very anxiety to utter the precise truth may cause hesitation; a wish to keep within the limits of the most exact correctness may lead to caution in the operation of memory, or the selection of language in which to express such operations. So that simple hesitation is no sign of guilt. Those most careless of correctness are the most fluent; so that simple hesitancy is no proof of crime. Besides, the witness may have time to collect his thoughts, to revive his memory, and thus escape any inference which might rashly be drawn from any apparent confusion.

But what is the purport of this argument? That all should be exempted from interrogation, lest perchance the innocent, with truth on their side, should be confused in its utterance, and that confusion be mistaken for guilt? The very announcement of such a proposition tends to its own refutation. So cautious and regardful are you of truth, that, lest the utterance of truth should overwhelm her with confusion, you doom her to eternal silence. The innocent, will he say, "True I am innocent, and for that very reason dare not answer, lest I may be confused and this confusion of mine be mistaken for guilt." Were the argument valid, confusion would be the result not of guilt but of innocence; the proof not of falsehood but of truth. Let it be so; confusion a sign of innocence; and still the innocent would be equally anxious to be examined and heard.(*s*)

But he may give contradictory or false statements, or may be unable to explain the inculpatory facts alleged by his opponents. True. What then? Because his answers may be unsatisfactory, or his explanations insufficient, should you therefore refuse to examine him? What they may be, can only be known by inquiry. And whatever danger there may be in receiving the deliberate answers of a witness prepared for examination, that danger is certainly insignificant compared with that of introducing his loose, casual conversations or unheeded remarks,(*t*) without explanation of the time, manner or circumstances under which they were made.

Of all assumptions, the most monstrous is that of the dangers of in-

(*s*) "The president (by the Code Napoleon) may ask from the witness and the *accused* all the explanations which he shall deem necessary for the manifestation of the truth."

(*t*) Admissions and confessions of the excluded prisoner are every day received. The inconsistency of this admission will be hereafter more fully examined.

vestigation to innocence; of a reluctance on the part of the honest to exonerate himself, through fear of increasing the chances of conviction by that very attempt. The rule, then, was not adopted for the benefit of the innocent; for on their part there is no reluctance to testify, because they cannot be endangered by their testimony; not for the benefit of the court, for where there is no motive for perjury there is risk of deception.

The accused, guilty and subjected to interrogation,(*u*) will either be silent, or his answers will be entirely true, or false, or mixed, embracing both truth and falsehood, as may seem most conducive to his own safety.

If, in answer to interrogation from either the judge or public prosecutor, he be silent,—for he may be so,—it is at the risk of that inference which is ordinarily drawn from silence. He would obviously answer, were such answer to be favorable to his own interest. If, then, with an opportunity for exculpation,—if exculpation be possible,—if, with the opportunity of asserting, and, so far as his solemn asseverations can be of any avail, of establishing his innocence, he will not avail himself of that opportunity, what is it, but an admission that an answer would be dangerous; that he even prefers the natural inference of guilt from silence to answering. If, then, knowing this inference will be drawn, he prefers it should be, what is it but an admission of its correctness. Silence is tantamount to confession. He cannot object to this conclusion, as a word from his mouth would remove all injurious inferences. He is silent then; because, if he answers truly, he must either convict himself of this or some other crime. If of this, then the inference is just; if of some other crime, that crime must be greater than or equal to that of which he is accused; for, if *less*, he would admit such lesser crime in preference to this inference. If greater, and he chooses

(*u*) The code of Louisiana authorises the examination of the prisoner by the committing magistrate, notwithstanding their constitution provides "that the accused shall not be compelled to give evidence against himself," but they are not *under oath;* thus depriving the courts of that sanction for truth; a sanction the more necessary in proportion to any supposed tendency to falsehood. But even by this code, the prisoner is not examined on the *final trial;* thus depriving the jury of all the advantages which can be obtained from publicity of examination; while, at the same time, there is a restriction as to the interrogatories which may be put. "1st. He must be informed that, although he is at liberty to answer in what manner he may think proper to the questions that shall be put therein, or not to answer them at all, yet a *departure from* the truth or a *refusal* to answer, without assigning a sufficient reason, must operate as a circumstance against him, as well on the question of his commitment as of his guilt or innocence on the trial.

"2d. The magistrate shall next put the following interrogatories: What is your name and age? Where were you born? Where do you reside, and how long have you resided there? What is your business or profession? Where were you when the act or omission, of which you were accused, is stated by the witnesses to have taken place? Do you know the persons who have been sworn as witnesses on the part of the accusation, or any, and which of them, and how long have you known them? 3d. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts that you think will tend to your exculpation.

"4th. These answers shall be reduced to writing by the magistrate," &c. Livingston's Criminal Code—Code of Procedure, ch. 4, art. 173.

So far all well; but the examination should be unrestricted, in open court, before the jury, and under oath, like those of the accuser or any other witness.

silence, it is because he prefers the punishment of the crime charged to that of the crime of which he is really guilty; so that even here no injustice is done. The prisoner suffers, and justly, though not for the crime committed. For, by the hypothesis, his answers, showing the greater, would disprove the lesser crime. So that he would suffer only for the less by silence. But however that might be, if he prefers this inference, whether it be correct or not, he has the right of choice. He *may* plead guilty, or he *may* be silent, when innocent; but he should not, *therefore*, be either exempt from pleading or answering. If guilty, and in answer to interrogatories, he discloses his guilt, the causes, motives, time, place and circumstances,—what stronger and more convincing proof can be desired? From his own mouth,—in open court, with the result of such avowal distinctly in view,—he unqualifiedly confesses the crime. That such avowal, if false, would be made, is not to be supposed. If there be any principle of human action which never sleeps, which never tires,—which, at all times and places, and in the minds of all, is in unceasing action,—it is that of self-interest. If there be any danger so remote and contingent as not to enter into our calculations of human conduct, it is that an individual of *sane* mind will ever deliberately inflict harm on himself. Besides, were this chance ever so great, its existence is neither obviated nor even *lessened* by excluding his examination; as the accused here likewise may, if he choose, plead guilty.

If, unwilling to confess or to hazard the inference arising from silence, he prefers to answer, he will so shape his answers, as they may best conduce to his escape. The prisoner interrogated will naturally state the truth; for it is easier to resort to the memory than to the imagination; easier to relate what has happened, than, at a moment's warning, to give a consistent story of what has *not* happened. The accused will never deviate into the regions of falsehood, when his purposes can be subserved by truth; so that the *staple*, the main portion of his testimony, will be true. Whenever the truth will lead to detection, falsehood may be expected, and that in the *least possible* quantities, from the danger of an unnecessarily enlarged admixture of so hazardous and difficultly managed an ingredient. It was the remark of a sagacious scoundrel, that a lie was too precious to be used except under the most urgent necessity. As in poetry, "*nec deus intersit nisi dignus vindice nodus*," so in testifying, the rogue of shrewdness never uses the dangerous weapon of falsehood except when under the pressure of the most imminent danger. The fool may be more rash, but his rashness is folly. His story then will present an admixture(*v*) of truth and false-

(*v*) "When on a trial all the witnesses tell lies, what are you to do? Is the criminal to escape, and are you to employ your time in the trial of the witnesses? In England, you would acquit the prisoner and try the witnesses. In India, you must convict or acquit the prisoner, on the strength of that portion of truth which you can *pick* out of the compound mass of truth and falsehood. There is not such a thing known in Bengal as a deposition which does not blend them together." Tytler's Considerations on the Present State of India, vol. 2, p. 106-7.

Is not human nature the same on the shores of the Ganges, the banks of the Thames, and the Atlantic coast? and could not the grains of truth be picked out as well by an English and American as an Indian jury?

hood variously commingled, and new dangers will arise from the conflicting elements of his story. The truth, by its consistency with other true facts proved *ab extra;* the falsehood, by its inconsistency with the true facts asserted, will both unite to convict him. The lie or the truth are both pregnant with dangers.

Fearing, then, to utter a falsehood, he may attempt evasion. If he evades—question after question is propounded, till from one evasion to another, he resorts either to silence—to silence with the inference arising therefrom, seen and admitted, and preferred to language—or to confession, the strongest and most satisfactory proof—or to falsehood—thus affording another evidence of guilt. Question after question is plied, till the abashed and confounded miscreant is at length driven to his refuge of lies—the last hope—the desperate shift of the self-convicted delinquent. But to him falsehood is full of peril—is encircled with ruin. He is surrounded by dangers, which as they cannot be foreseen, so they cannot be guarded against. Detection, contradiction, refutation, may spring up from any quarter. Like Orestes, chased by the furies, the false witness, turn whither he may, is still haunted by the lies he has told.

That then the accused, if *guilty*, should object being placed in an attitude so dangerous to him, *because* he is guilty, is what might have been expected. Just as much as he would wish to escape punishment, just so far would he wish to avoid saying or doing, or having others say or do, what might lead to its infliction. His objection to testifying, is an objection to punishment. Whether the testimony, which proves his guilt, should come from his own or the lips of another, is immaterial; or if material, the preference would seem to be, that it should come from his own, inasmuch, as from so friendly a source, it cannot but happen, that his story will be narrated in the most favorable manner—more favorable, than by any other witness, however disinterested he might be; that he will take care, that all facts, which may seem to lessen the appearance of guilt, or if guilty, which tend to lessen the apparent atrocity of the crime, will be fully set forth. So far, therefore, as condemnation is the result of his own evidence, so far he may be assured, that there will be no misrecollection, no forgetfulness, no misstatement of what may serve, or be thought to serve his interest; he being judge of those interests. Adverse interests, prejudices, perjury, may be urged against all other testimony; but the prisoner can never urge these against his own statements.

If then the *hardness* of giving this testimony, if any supposed punishment, its probable consequence, be a valid argument against requiring it from the prisoner—it is an argument equally valid, against requiring it from any other source. The punishment is the result of the facts proved, and whether those facts come to the cognizance of the court from one source or another, from the accuser, the accused, or from extraneous witnesses, it makes no difference. Whatever objection he may have to testifying himself as to facts, which may lead to his punishment, he will have the same to this testimony

from any other source. This argument, if valid, would exclude all testimony.

Further, if the prospect of punishment, resulting from the disclosure of facts, be a valid reason for excusing from, or not compelling such disclosure, much more should it excuse him from all punishment. If the hardship of disclosing excuses, why punish at all? The hardship of suffering the punishment of the law is greater than that of disclosing such facts, as may lead to such suffering. He who would exonerate the prisoner from the lesser, most unquestionably should from the greater. The hardship of disclosing is only the fear, the anticipation of its onerous results; but, if the fear of such results be a ground of exemption, much more are the results. The punishment is greater than the fear of it. If the dread of it be a valid reason for withholding the means requisite to obtain the necessary proof to authorize its infliction, much more is it a reason, why such punishment should never be borne. The more burdensome punishment is than its anticipation, so much stronger the argument for exemption from all punishment—than that for excluding the proof by which guilt may be established.

Evidence is offered for the purpose of punishment—the punishment, the object of its introduction is urged as an argument for not receiving it. The law punishes for the omission, or commission of certain acts—this punishment is hard to be borne, else it would cease to be punishment—therefore, because of its *hardness*, you are excused from disclosing, what may lead to such unpleasant consequences. The law, the reason for its own nullification. A man is tried with the avowed intent of subjecting him to punishment—the means of ascertaining guilt are withheld, lest they should lead to the infliction of the punishment desired. Because punishment is hard to be borne, therefore, it need not be inflicted. Were punishment *not* punishment—something pleasant and desirable—it would be otherwise.

The punishment to be imposed, let it be remembered, must in all arguments on the subject be considered as just and expedient—the offence for which it is inflicted, as deserving the precise penalty imposed. Were it otherwise—did the act, whether of omission or commission, deserve a milder, or were it entirely undeserving any punishment, the proper remedy would be a repeal of such injudicious law.

The giving of testimony is attended with trouble and vexation. The delivery of testimony by the prisoner is attended with no greater hardship, than that of any other witness, save to the extent of fear of punishment arising, or to arise from such testimony. The witness, then, by the assumption guilty, but reluctant to disclose such guilt, on account of the punishment consequent thereon—for when there is no punishment, the simple labor of utterance, a reason applicable to all witnesses, is the only objection, might be supposed to address the judge, or the legislator in something like the following language.(*w*)

(*w*) In Hardre's Reports may be seen an edifying argument on this subject, in the case, The Attorney-General v. Samuel Mico. Demurrer to a bill to discover certain forfeitures to the commonwealth. Hardres for defendant. "I shall con-

"I, and not I alone, but the whole tribe of criminals—for in this matter, there is a wonderful union of sentiment—I am averse to pain, to suffering, to punishment. All wrong-doers have a similar aversion. By subjecting me to examination, as I am guilty, it could hardly happen, that I could adopt any course, which should be free from danger. Indeed, were it not for the expected proof against me, you would hardly inquire. What is very obvious, a matter you cannot help perceiving, is, that my path would be beset with peril. Silence, you would consider as a mark of guilt—falsehood, when detected, would excite your suspicions and the truth would assuredly condemn me. This prying into my conduct—this investigating my doings—this eternal questioning I abhor, it cannot do *me* any good. I should prefer the exclusion of all testimony, by which my guilt, could be established. Indeed, considering the hardship, the law should be so; but, if this cannot be granted, deliver me from all examinations, all questionings as to any transactions of mine. *They* will not bear it. In fine, I wish to avoid all punishment. Truism, though it be, I have great reluctance to enduring suffering, and wish to avoid whatever may lead to it."(x)

The argument of hardship pre-supposes the testimony uttered true. It is hard, because truth will condemn him. If false, the prisoner would hardly beg to be excused from answering, lest he might commit perjury. "Inquire of me, and I shall most assuredly commit perjury—therefore, to save me from this sin, I beseech you, put no questions."

The legislator, or the judge, usurping the place and functions of the legislature, having thus heard the reasons, why the law should not be enforced—at once, from mistaken humanity,—mistaken, so far as the body of offenders is concerned, inasmuch as uncertainty of punishment leads to increase of crime—mistaken, so far as the public are concerned,

sider the demurrer consistent with and agreeable to all manner of laws,—the law of God—the law of Nature—the law of the land.

"1. For the law of God. That not only allows, but rather commands, every man to preserve himself from hurt and damage; as appears by the case of St. Paul, mentioned in the Acts of the Apostles, who being accused by the orator Tertullus for sedition and other crimes before the governor, answered, I am not careful to answer thee about these things: in that I am not bound to answer thereto. And when Pontius Pilate asked our Saviour some questions, he answered nothing: whence it appears what the law of God and the god of law allows in such cases of crime.

"2. For the law of Nature. That is of the same stamp; hence the rule, *Nemo tenetur, &c.* . . . . The second head I insist on is reason. 1. It is against the common practice of all courts of justice to enforce men to answer in such cases. . . . . 2. There is no precedent of any such practice for twenty years and upwards last past; and disuser renders a thing absolute . . . . 3. By third reason it is *ab incongruo.* It is a very *incongruous way of proceeding;* for by this way the ordinary way of proceeding by information and indictment would be interrupted, and the rule is, *Non est decurrendum ad extraordinaria ubi valet ordinarium.* 4. If this were allowed, what need would there be of searchers and *officers to look* after such things? 5. Because the matter charged is a direct crime, &c., &c. . . . . .

"So it appears the ecclesiastical court cannot examine men upon *their oaths against* their wills only in two cases: but not in criminal cases, as incontinency, &c., &c. For as the civilian says, that was *inventio diaboli ad destruendas miserorum animas ad inferum," &c., &c., &c.*

(x) "Let them prove it," says the scoundrel; "Aye, let them prove it," is the responsive echo of the judge.

for they suffer by every guilty man, thus thrown upon the community, and by the incitement to crime, arising from every additional instance of escape from punishment—excuses the reluctant scoundrel from testifying. Aye, not merely excuses, but if perchance in a spirit of unwonted honesty, the accused should admit his guilt, he is advised, encouraged, and entreated to retract his plea, and substitute a lie, and the jury compelled to declare it the truth, even against the evidence of their own senses. Nor is even this enough, but the whole armory of quibbles is placed within his control and their use sanctioned, and approved, by the ablest and wisest judges.(*y*)

Of these rules the effect is to screen the guilty, by exempting them from what they most dread—interrogation. Were the criminals to frame a code for their own special protection, their first provision would be to protect themselves from all inquiry into their conduct. The present law benefits the criminal, by exempting him from the dangers of detection, and injures the innocent by depriving him of the benefits arising from an inquiry into his conduct.

As for the judge, the only reason he could urge, would be the fear of deception—for, if not deceived by testimony, no harm, so far as relates to correct decision, has ensued. But as deception would only be the result of incompetency, as this evidence can as well be weighed as any other, he will hardly exclude the evidence for that cause. The judge, who is fit for his station will never exclude any witness through fear, that after hearing, he may erroneously decide—to do so, would be saying, that he can decide upon the truth of a witness, better *without* than *with* hearing him.(*z*)

The prisoner, then, should be examined, unless guilt on his part, or imbecility on the part of the judge, should be considered as affording valid grounds of exemption.

(*y*) "Whatever may be the degree of guilt, how strongly soever proved, yet if the defendant is entitled to a legal advantage from a literal flaw, *God* forbid he should not have the full benefit of it." Per Lord Mansfield in Rex v. Horne, Cow. Rep. 675.

(*z*) This subject has already been discussed in previous chapters on the rules of evidence.

CHAPTER VIII.

THE ADMISSION OF THE ACCOMPLICE AND OF THE PARTY TO THE RECORD IN CRIMINAL PROCEDURE.

THE accused, it has been seen, is not compelled to testify against, nor is he received to testify in favor, of his own interests. In case of *many* defendants, a question arises, whether, though not examinable in their own cause, when their interest is to be affected, they may yet be examined *severally, for or against each other.*(a)

In civil causes no motives for secrecy exist. At the time of making a contract it is the mutual wish and expectation of the parties that it should be performed—and as a measure of precaution, its terms and conditions are either reduced to writing or stated in the presence of some one in whom mutual confidence is reposed. Whatever interest the parties have in a contract—an equal interest they have in being able to prove it—so that any deficiency of proof may, in ordinary cases, be imputed to accident, rather than design. In the counsels of the criminal, secrecy, the most complete and entire, is a necessary ingredient. Self-preservation teaches him that the fewer his associates, the less each know of the designs and acts of the others, the greater the common security. If the crime itself, or any acts anterior or subsequent to its commission, are known to others, it is because the utmost vigilance, caution and sagacity of knaves are but feeble and inadequate securities against detection. If then any proof of crime exists save in the bosom of those who committed the deed, it is the result of causes above and beyond control. A witness may be called to attest the terms of an agreement, but never to the torch of the midnight incendiary or the dagger of the assassin. Contracts seek, crime shuns all proof of its existence.

Important, then, as is the admission of parties as witnesses in civil, still more important is their admission in criminal procedure. If testimony be required, it must be sought for where alone it is attainable. Unless those who are guilty are called on to give testimony, unless the officer of justice enter the hiding-place of the vagabond and explore the secret retreats of knavery for the associates of crime, he is without evidence or the hope of evidence. The presence of the actors is as certain as the act—that of others a matter of uncertainty. As well

(a) Some are prohibited to accuse, as women,—because of the *revengeful nature of the sex*—pupils, soldiers in pay, that they may not be absent from the service, infamous persons, those that are bribed, &c., &c. Wood, Civ. Law, 329.

might the judge anticipate the presence of the chaste and dignified matron at the licentious orgies of an impure and polluted metropolis, as that the crimes of the outlaw and felon should be proved by honest and trustworthy witnesses alone. *Testes lupanares in re lupanari*, was a maxim of the Roman law, arising from the necessity of the case and involving principles, which should always guide in the investigation of truth in similar cases. Were then the accomplice excluded, one of the most important means of detecting crime and bringing it to punishment would be lost.(*b*)

But the exclusion of the testimony of an accomplice for or against his associates cannot be placed entirely on those grounds, which are supposed to justify the exclusion of a party when his own interests are directly in issue. When the testimony of a party was called for against his own interests, the hardship of uttering such self-disserving testimony was considered a sufficient reason for not requiring it. The accomplice may testify against his associates without in any degree criminating himself. So far, no conceivable reason for exclusion exists. Were the evidence necessary, and were he *compelled* to testify, he would be without any motive to testify *untruly*, in favor of or against his associates. Were no results beneficial to himself to ensue from his testimony, he would obviously be devoid of any sinister bias in delivering such testimony. To receive him was seen to be necessary. Receiving him, all that remained was to deteriorate as far as possible the trustworthiness of his testimony. It will be abundantly evident, on examination, that the law on this subject is alike in direct opposition with its own recognized principles and with the ends of justice.

"The evidence of the accomplice has at all times been admitted, either from a principle of public policy or judicial necessity, or from both."(*c*) * * "The pledge of the government is given that the State's witness shall not be prosecuted if he make and testifies to a full disclosure of all matters in his knowledge against his accomplices. * * In England as well as in Massachusetts, those who are admitted as witnesses for the government may rest assured of their lives, if they perform their engagements.(*d*)

Were the parties in all cases subject to examination, no such rule could ever have existed. The inevitable consequence of freeing the parties from personal examination is, that resort is necessarily had to this most suspicious evidence. Lest the tender and delicate sensibilities of the criminal (for if not a criminal the objection is inappli-

(*b*) Obvious as this necessity is, yet in some countries they have attempted to administer the law without resorting to this evidence.

* * "To avoid the danger of false swearing, we enlarge the provisions of the law, by which it was forbidden to put the accused upon his oath *as to himself but not as to others*. Now we absolutely *forbid* in future that any one who is proceeded against at law, should be put on his oath, whether as regards himself or others—whether those others be *accomplices or not*, in any *case or circumstances whatever*, even though the accused should desire to be put on his oath to clear himself." Reform of Criminal Legislation in Tuscany, 1786.

(*c*) 9 Cowen, 709, The People v. Whipple.

(*d*) 10 Pick. 493, Com. v. Knapp. Unless he be the first contriver of the plan—in which case he shall not be pardoned. 3 Ellis, Polynesian Researches, 140.

cable) should be wounded by the importunity of interrogatories, another whose guilt is admitted, is turned loose on society. To procure the *chance* for the conviction of one, whom the law assumes to be innocent, another, whose guilt is unquestioned, is pardoned. So that to the punishment of one malefactor, the acquittal of another is an indispensable condition. From mistaken humanity the party is excluded. To remedy this mistake the pardoned accomplice is admitted.

The pardon is granted because "the witness, who is not bound to criminate himself, *does so* in order to discover *greater offenders.*"(*e*) That *greater offenders* may be discovered—the reason. But as to *that* fact, should implicit reliance be placed in the self-accusing criminal? In the case of a joint indictment, the testimony of some one of those thus indicted may be required for the conviction of his fellows. It may frequently happen that one is entirely innocent; and if not so, there are always gradations in guilt. The testimony of the supposed guilty, but really innocent defendant, is receivable only on condition of his admitting his guilt. To qualify himself for a witness he must commence with a lie.(*f*) Were he guilty, or, being innocent, would he only acknowledge guilt, he is received. Innocent and assisting innocence, he is excluded. Admitting his guilt, that furnishes an unanswerable ground for admission.(*g*) But this is not all. Who of those indicted will offer his testimony? The guilty or the innocent? The guilty most assuredly. The innocent never. The guilty man has every motive, the innocent none. Being innocent, what can he disclose? Or if it should so happen that any facts transpired within his knowledge, will he assert a falsehood, the only terms upon which he is admissible, or will he not rather rely on his innocence? The guilty having every thing to gain and nothing to lose, and the greater his guilt the greater his inducement, will proffer his testimony against his supposed fellows. The real thief utters the loudest cry and is the most zealous in the pursuit, hoping thereby to avoid any suspicion of his own delinquency. Thus is it, innocence, unwilling to bear the imputation of crime, is excluded. Guilt, enticed to further crime by impunity for the past, is received, pardoned and heard.

(*e*) 9 Cowen, 911, People v. Whipple.

(*f*) "In Sir Peter Crosby's case in the Star Chamber, it was ruled, that if *two* defendants be charged for a crime, one shall not be examined against the other unless the party examined *confess himself guilty*, and THEN he shall be examined." 1 McNally's Ev. 195.

(*g*) It would seem some had intimated that they were hardly *trustworthy* witnesses. See how indignantly the law frowns at such a suggestion!

"It is *said*, they are not *probi testes*. (Some folks will say any thing.) They are *probi testes et honesti* too; for in case of an approver, that man that accuses his brethren upon the same treason, of *merit and justice*, the king ought to grant him a pardon; for they that discover the traitors against the commonwealth are certainly *probi testes*, and this is no objection to them in that, but as before they were *legales testes*, so they are *probi testes:* and good and competent in this case." 1 McNally, Ev. 193.

Where there are many defendants—and one does not accuse himself but accuses a co-defendant, he is not a competent witness to condemn his companion—but if he had accused himself, *then* he should be received to condemn his companion. Anon., Noy, 154.

Nor is this all. Where the reason, such as it is, is totally inapplicable, the law is the same. In the case of a verdict against one of several defendants, the defendant thus convicted is not compelled to testify against the others except under the implied promise of a pardon.(*h*) The witness being convicted, the results of the most self-criminating evidence have ensued. No conceivable motive to perjury, no sinister interest—no supposed hardship exists. Falsehood for or against the prisoner will in no way subserve his interests, yet the witness so situated is excluded, unless to procure his evidence, a sinister interest adverse to the prisoner is created specially to authorize his admission—unless the convicted felon is pardoned with the hope and upon the contingency that he may by his testimony convict one whom the law itself presumes innocent.

The pardon is granted, provided, in the opinion of the judge who presides, he make a "*full and fair* disclosure," in other words, provided the testimony be adverse to the prisoner, for if the witness vary in his statements or refuse to testify as he promised, he is treated as a violator of his contract, and convicted by means of his previous confessions(*i*)—so that it is the necessary result of this provision, that he testify adversely to the prisoner. Any different testimony ensures his conviction. The contract is that provided his testimony be adverse to the prisoner, whose innocence is presumed, he shall be discharged.

The reason of this anomalous admission is founded in the presumption that, after and as a consequence of this pardon, he will speak the truth.(*k*) If correct, a reason of unquestioned validity; but whence arises this presumption? Is it any greater before than after this implied promise of pardon? Is the testimony different, when delivered under this hope of pardon, from what it would have been without such promise? If nay, if the expectation of pardon does not vary the testimony of the witness, then it follows that the pardon has effected no good whatever.

Is his testimony different? If the promise of pardon afford any presumption of truth, then he is to be believed who, by the supposition, regards not the obligation of an oath, and who utters the truth only as he is rewarded. In all cases he is without any legal, that is, pecuniary

(*h*) This is not because of the conviction—for until judgment, the conviction does not exclude. The law on this subject is fully examined in the People v. Whipple, before cited, where the court decided, that if Strange, who had been convicted, should be called against Mrs. Whipple, that it would be necessary to pardon him.

(*i*) 10 Pick. 484. Com. v. Knapp.

(*k*) "The law presumes that if admitted to testify, he will speak the truth." 9 Cow. 715.

A presumption, the meaning and effect of which may be judged by the following authorities.

"It is an invariable rule, that unless some *fair and unpolluted* evidence corroborate and give verisimilitude to the testimony of an accomplice to recommend to the mercy of the crown, a prisoner convicted under such circumstances." McNally's Ev. 204. In this way *both* escape.

"It is not usual to convict upon the evidence of *one* accomplice without confirmation: and in my opinion it makes *no difference* that there are *more* than *one*." Per Littledale, J., in Rex v. Noakes, 5 Carr. & Paine, 326. Vide 6 C. & P. 391, Rex v. Addis. Such is the confidence reposed in the *testes legales et probi*—such the value of this presumption. 6 C. & P. 681, Rex v. Webb.

interest in the result of the trial of his associates, for the dignity of the crown forbids the paying or the receiving costs. What then has caused this supposed difference of testimony? Before the promise it would have been favorable; after, it becomes adverse to the prisoner. Without the promise, he has no motive adverse to the truth; with it, he stands pledged to a particular course of testimony, caused by the assumption, by this very promise—so that the law prefers bought to unbought, bribed to unbribed testimony, and that too where life is the premium for perjury.

If it should be said that this is the only mode in which this evidence can be obtained—lamentable indeed would be that administration of justice, when the law, neglecting the means of its own enforcement, should stoop to bribe the assassin and malefactor, and to extinguish the last vestige of honesty by rewarding them with impunity. But it is not so. If the testimony of one defendant, when called for against his codefendants, should in no way affect his interest, then no reason for exemption can be given, which does not equally apply to every other witness. If it should in any degree be self-criminative, it has already been seen that the hardship of uttering such testimony affords no reason for exemption when one's own case is on trial, and still less does it when the fate of another is in issue. The benefits of general admission in this case are incalculable. In this way alone, all conflicting and opposing interests are heard, and the several acts of each as stated by himself, by his associates and by the witnesses of the prosecution, accompanied by every palliative suggestion that self-interest, by every criminative assertion the zeal and animosity of the prosecutor can suggest, are fully and distinctly set forth. By this course all is made known—and the judge or jury decide after being enlightened and instructed by all the information which exists in relation to the facts—the only proper course to be adopted unless the truth bewilders—unless a knowledge of the facts be considered undesirable—a position which, unfortunately for the cause of justice, receives too much the sanction of the common law.

The common law removes all interested witnesses "*from testimony*, to prevent their sliding into perjury; as it can be no injury to truth to remove those from the jury whose testimony may *hurt themselves* and can never *induce* any rational belief."(*l*) It removes the criminal, "because the credit of his oath is overbalanced by the stain of his iniquity."(*m*) Such the law and its reasons. By way of enforcing and illustrating these principles, the prosecuting officer selects an avowed criminal, with whom a *contract*(*n*) is made for the delivery of certain specified testimony, under the severest penalties of the law in case of failure to perform the engagements thus entered into. The judge, meanwhile, aware as he is of the dangers of perjury in the witness, of deception in the jury, scruples not to sanction and approve this very course by his own recommendations.

As it is in the power of the prosecutor to determine by whom the

(*l*) Gilbert's Ev. by Lloft, 224. (*m*) McN. Ev. 207.

(*n*) The manner of making, the terms and conditions of the contract referred to, and the fate of the *non*-performing criminal, may be seen by referring to 10 Pick. 491. Com. v. Knapp.

station of defendants shall be occupied—as it is one never voluntarily assumed, and in which there is no choice of associates—as the innocent and guilty are alike liable to accusation—the innocent and those by whom such innocence can alone be proved—the law in relation to the admission of defendants as witnesses for each other acquires a commanding importance.

The accomplice, from "*judicial necessity and public policy*," is received and examined against all his supposed associates—if being a party to the record, the prosecuting officer enters a *nol. pros.* to procure his testimony. The policy of committing evident wrong to effect a possible and contingent good, has received the approbation of the law. Admit the policy of calling the accomplice against his associates—the admitted guilty against the presumed innocent, is it not equally necessary for the purposes of acquittal to call those without interest? The accomplice is pledged to a particular course of testimony. One defendant testifying for his associates has no pecuniary interest to subserve, but the reverse; for wherever costs and penalties are to be paid, the more there are among whom such costs and penalties are to be subdivided, the easier is their amount to be borne. Infamy a reason for exclusion, yet, guilt or its admission has alone procured the accomplice a hearing. The defendant, whose guilt is yet a matter of proof, is excluded. The judge, wishing for instruction, bribes the traitorous accomplice with life to testify against the presumed innocent—without fears as to the result, and when, if deception ensues, innocence must perish. Misdecision against the prisoner brings no terrors. No judicial necessity, no public policy interposes to exclude admitted guilt, lest thereby innocence may be endangered. Judicial fear is only on the alert to prevent the escape of the accused.

In case of numerous defendants, they are severally excluded from testifying in favor of each other, (not because any supposed interest exists, nor because any presumed infamy destroys their veracity, but simply) because they are parties to the record.(*o*) The only ground for any such rule which has any pretence to support it, is, that that fact indicates, or may be presumed to indicate, some interest. When that ceases to be so, when there is no interest,(*p*) the exclusion amounts to this—that the party to the record is excluded because he is a party to the record, and for that reason alone. In this case of numerous defendants the exclusion is unsupported by any supposed interest on their part—for their interest is to have as many associates as possible. Neither is the witness refused because any well-grounded presumption exists that he is a party to the crime, for avowed guilt is every day admitted. No

(*o*) 10 Pick. 57, Com. v. Marsh. "It is an inflexible rule of evidence that parties to the record are not admissible as witnesses. * * The rule is *not* founded exclusively on the ground of interest but on that also of public policy."

10 John. 95, People v. Bill. It is his being a *party to the record* that renders him incompetent.

(*p*) "The circumstance of the person offered as a witness being a party to suit or record is *prima facie* evidence of his having an interest. If it be shown,—the evidence of interest not being conclusive, but presumptive merely,—that he has no interest in the case or the result of it, it would seem to follow, as a natural consequence, that he may be a competent witness." 3 Rawle, 409, Hart v. Hulm; Patten v. Ash, 7 S. & R. 116; 7 Bing. 379; Worrall v. Jones et al.; 3 Binney. 306.

matter how innocent or trustworthy the witness may be, provided his name be on the record, he is, for that cause, excluded. The records of a court, like the touch of the leper, are infectious. The party to the crime is received—the party to the record refused. The vision of the judge never extends beyonds the tautological verbiage of his own records to the reasons and foundations of a rule. Interest, infamy, perjury, weigh but little before the technical dangers of the truth-destroying record. Regard you guilt? No, records, lying records exclude—records, too, of accusation merely—not of conviction.(q) Follow precedents, is the rule, always preferring, in case of variety, those of a barbarous age, of a tyrannical judge, of a despotic reign.

Party to the record a valid reason for exclusion. So be it. The reason suffices only while the parties unite in asserting their innocence, and are free from any proof of guilt. Let one of the accused only confess his guilt, or let it be established by the conclusive proof of a verdict, and the insane fear of the record vanishes. Conviction,(r) instead of *incapacitating*, renders the individual convicted a competent witness—a meet and acceptable offering to the dainty palate of the judicial epicure. It even overcomes the leprous stain of the record—like a pardon, makes the felon a new creature, and renders him trustworthy. Such the wondrous effects of conviction. For if not such the effect, why does the law vary before and after the conviction? The party, to be received, must be convicted; convicted and judgment rendered—the purifying remedy of a pardon becomes necessary. It is only while in the chrysalis state—after conviction and before judgment—that he is received—and whether he is then to be received is by no means so certain, for Lord Ellenborough,(s) fearing lest defendants might suffer judgment by default, refused to admit such defendant. That from sympathy, one felon would assume the guilt and bear the penalties of the law, for the purpose of procuring his own admission as a witness for his associates, is a far-fetched and improbable supposition. Suppose it were possible that one of many delinquents would thus sacrifice himself for the general good, it is by no means a necessary consequence that he would be believed. The friendship of Damon and Pythias one would suppose a scene of every day life amid the felons of Newgate, and that to prevent its re-enaction at the king's bench the witness must not be heard.

Sympathy a reason. It would seem that this sympathy is supposed only to exist when the parties are bound together by the ligament of an indictment. Let there be several indictments,(t) and the chain of that romantic friendship is tarnished, the ties which bind these culprit

(q) One of several indicted, not admitted a witness though no evidence adduced to criminate him. Coxe's N. J. Rep. 1; State v. Carr et al., 1 Dev. Rep. 363.

(r) "A party in the same suit or indictment cannot be a witness for his co-defendant until he has been first acquitted or *at least* convicted." 10 J. 95, People v. Bill.

(s) 5 Esp. 155, Rex v. Lafine et al. "If two were indicted, one by suffering default, *might* protect the other." The sky might fall and his lordship catch larks.

On an indictment against two for felony, and a separate trial of one of the defendants before the other on motion of the prosecutor, the defendant *not* arraigned is not a competent witness for the other. People v. Williams, 19 Wend. 377.

(t) An accomplice separately indicted is a competent witness either for or against a witness indicted for the same offence. U. S. v. Henry, 4 Wash. C. C. Rep. 428.

friends in indissoluble union are broken, and the fears of the judge vanish. They vanish, too, when the dangers are the greatest. For great as may be the probability of perjury in joint, it is none the less so in several indictments, while the chance of deception is greater in the last case, because the danger is less apparent.

But distinctions without a difference are emphatically part and parcel of the common law. In case of one of several defendants being defaulted or convicted, "there seems to be no *good* reason why he should not be permitted to testify for or against the other defendants: for after conviction he is no longer a party to the *same issue.*"(u) If, instead of being defaulted or convicted, a defendant procures a continuance, for himself, he ceases to be a party to the issue which is raised between the commonwealth and his fellows equally as if he had been defaulted or convicted, yet in this case he is excluded.(v) If being party to the issue is what excludes, no reason can be shown why in the one case the rule should be admission, in the other exclusion. Party to the record, party to the issue,—such the magic terms, by which the judicial sorcerer opens or closes the temples of justice as he lists. Such the cant phrases, the skilful and adroit use of which gives a man the reputation of learning without the reality.

Exceptions.—The symmetrical inconsistency of the common law would be marred, were there no exceptions to its general principles. Some of the most important violations of those principles will now receive a brief examination.

Trials by information.—In this case the preliminary trial is by affidavit for the purpose of determining whether there shall be a trial before the jury. Upon a rule to show cause, the prosecutor and defendant respectively present their own and the affidavits of others to the consideration of the court,(w) who grant or discharge the rule as in their view the evidence preponderates. Now, whatever may be the danger of hearing the parties in public, and when subjected to the perils of cross-examination, it is obvious that those dangers are immeasurably increased, when the same parties deliver their testimony in language carefully and deliberately studied, presenting all favorable, concealing all adverse facts, with every opportunity for premeditation, without check to indistinctness, evasion, concealment or falsehood, under the guidance and direction of an hired attorney, whose ingenuity is brought in aid of their own to deceive, if need be, the judge. Both parties present, but no questions asked. Such is the character of

(u) 10 Pick. 58, Commonwealth v. Marsh, 1 Yer. R. 431, State v. Mooney et als.

(v) Though several be jointly indicted for the same offence, yet the indictment, when the nature of the offence is several, is also several as to each—so that it would seem, that if separately tried they would be competent witnesses for each other. 2 St. Evi. 762. Although it *would so seem*, yet the authorities, as has been seen, are otherwise. In People v. Bull, 10 Johns. 95, where two person were indicted jointly for an assault and battery, one of them being tried first, it was held that the other defendant was *not* a competent witness for him. So it was held in Com. v. Marsh, 10 Pick. 57. But where two persons are jointly indicted for house breaking, and one of them pleads guilty, he is a competent witness, *before* sentence, on the trial of the other, Com. v. Smith, 12 Met. 238. So if one of the defendants being fined, *pays* it, he is admissible "the matter being now at an end as to him." Rex v. Fletcher, 1 Strange, 633.

(w) 1 Chitty, Cr. Law, 700, et seq. After trial affidavits again are offered when the question of punishment comes up for adjudication.

This was intended as part of the preceding chapter. The exceptions therefore are such as exist in reference to the rule by which parties are excluded in criminal proceedings.

the species of evidence which, without scruple, is every day offered to the consideration of the court. Is the party anxious for a verdict? he can be none the less so that there shall be *no* trial. Important as may be the final, still more important is the preliminary trial—because success in this puts an end to all further proceedings. With one cause dependent on his testimony he is rejected, with two, received.

Attachments for contempt.—But a still more striking instance of a total disregard to the general principles of the law is to be seen in the case of attachments for contempt.

"It only puts the complaint into a mode of trial where *the party's own oath will acquit him*, and in that respect it is certainly a more favorable trial than any other; *for he cannot be convicted if he is innocent*, which, by false evidence, he may be by a jury; and if he cannot acquit himself, he is but just in the same position as he would be in if he was convicted upon an indictment or information; for the court must set the punishment in one case *as well as the other:* they do not try him in either case: *he tries himself in one* case, and the jury try him in the other."(*x*) A favorable mode of trial for the accused—but the last mode to be adopted by one who has such fears of interested witnesses. "*He tries himself.*"(*y*) Is he fit trier of himself? No one should sit as judge in his own case. Yet here the defendant, by his own uncontradicted assertions, determines the cause. If he answer falsely, he is acquitted. The guilty and the innocent are alike acquitted, provided they will only assert innocence. In other trials, even in the perjurious litigation of affidavits, falsehood may be disproved by conflicting evidence. Here all disproval is prohibited. That this course is sufficiently favorable is plain enough. The party's answer is taken as conclusively true. No matter though the contempt were ever so gross and palpable—yet on condition of simple denial, the defendant is acquitted. Were this witness, whose testimony is received as verity itself, called to testify before a jury, they would one and all shudder at trusting their twelve co-workers with such dangerous testimony. The same judge, who, anticipates perjury in every word uttered by a party with all the precautionary means afforded by counsel, interrogation and counter-evidence, dares not even trust a jury enlightened by the caution of his own sensitive imagination with the same evidence, which he is ready and willing to hear himself. The dangers of deception are greater in this case, because, by the hypothesis, he is an incompetent judge of evidence when compared with a jury. As for degrees of testimony, the judge knows none. Too false to be heard, or too true to be contradicted, are his rules. Were the question to be asked if a criminal is to be heard, the answer would be, yes, provided no precautionary measures are taken to prevent perjury: no, when every aid to protect the jury from deception is at hand. If the road to perjury only be smoothed and made easy, a general and unlimited entrance is given to the testimony of the criminal; when there would be any danger of detecting and disproving perjury, if it existed, the compassionate sympathy of the judge refuses to receive him.

(*x*) Wilmot's Opinions, p. 257, 258.

(*y*) Una et eadem persona non potest diversas sustinere partes. Sed alius *debet esse Judex, alius actor, alius Reus, alius Testis.* Laulerbach, Lib. 22, tit. 5, § 27.

CHAPTER IX.

THE ADMISSION OF HUSBAND AND WIFE.(a)

THE Roman law, and, as derived from that source, the law of Scotland and of all continental Europe, jealous of testimony, excludes all

(a) Since this was written I am happy to find the concurrence of high judicial authority.

In Stapleton v. Croft, 18 Ad. & El. (N. S.) 367, Erle, J., in reference to the subject under consideration, remarks as follows: "It is said in Taylor on Evidence, 899, that the admission of such testimony would lead to dissension and unhappiness, and probably to perjury, and that the confidence subsisting between husband and wife should be sacredly cherished. There is no doubt that the law most carefully protects the interests connected with marriage, and that it established the union of interests above mentioned for the purpose of domestic union, and excluded the testimony of the wife when the husband was excluded on account of this union; and the expressions above cited, if confined to the exclusion of the wife when the husband is excluded, have a definite meaning, capable of a practical application; but if they are carried beyond this limit, and are supposed to introduce the tendency to domestic discord as a ground of exclusion, they will be found to be contrary to the known principles of evidence, and to be incapable of being consistently applied. For if this ground of exclusion existed, it would apply to other witnesses as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may mutually contradict and discredit each other upon matters full of family dissension as if the marriage was null. Even if it could be supposed that the law regarded only the domestic peace of parties, and protected their confidence, still the supposed ground of exclusion is not consistently applied: for if a husband is assaulted or libelled, he may seek redress either by action or indictment. In either form he is in substance the party. If he proceeds by action, he and his wife are incompetent; if by indictment, both are admissible either to corroborate, or contradict or discredit each other. Now, if the principle of excluding the wives of parties was the protection of domestic peace and confidence, the wife ought to be excluded equally in both cases: but she was excluded only in the action, where, as the husband was also incompetent, it seems better reasoning to attribute her exclusion to the uniform principle of union, than to suppose a regard for domestic peace in the civil court to be neglected in the criminal court."

"If the question may be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she has happened to witness. If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law; these evils are certain, and if the notion of a compensating good in the promotion of domestic happiness by rendering the wife powerless as a witness be analyzed, I believe it will be found illusory. The idea that husbands generally would suborn their wives to perjury, and persecute them if they spoke truth, is to my mind unworthy of the time; there is no reason for supposing that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses.

from testifying who are united by the ties of relationship, of friendship, or of mutual dependence and support.(*b*) The host and his guest, the friend and enemy, the master and servant, the landlord and tenant—all those connected by consanguinity or affinity—all, in fine, from whom information as witnesses would be most probably derived, seem, as if for that very cause, rejected.

Reasoning from that inordinate fear of pecuniary interest, which forms so striking a characteristic of the English Law, it might naturally be inferred, that its rules of exclusion would be as rigid as those of the civil law. Error may be scientific—madness may be logical, erring only in the premises upon which its false reasoning is based. The common law, formed by the accidental opinions of different minds in isolated cases—and without the slightest attempt at generalization—precludes all reasonable expectation of science or logic in its principles, or of symmetry or consistency in its several parts. While, therefore, the slightest pecuniary interest is excluded, all the relations of life, with but one and that perhaps an accidental(*c*) exception, are received as witnesses in all cases and under all circumstances.

Husband and wife "are not allowed to be evidence for or against each other * * * *principally* because of the *union* of person; and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet:*" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*"(*d*)

And if by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to truth, and the consequent loss, he would dissent with much reason from the zealous declarations that such a means for protecting the peace of his family and the sanctity of his marriage was better than administering the law according to the truth."

(*b*) Quum nemo censeatur testis idoneus in causa ubi interest ejus alterutrum vincere: consequens est, ut nemo admittendus sit in causa vel propria, vel socii. Ut merito repellantur pater in causa filii, filius in causa patris, aliique potestati vel imperio alterius subjective, vel domestici. Ut patroni, tutores, curatores in causa clientis, pupilli, minorisve sui testimonium dicere non possunt. Ut suspecti etiam sint amici et inimici nec non, qui jam antea in eum reum dixerunt testimonium. Heineccii Elementa Pandectarum, pars IV. § CXL.

By the old Scotch Law, those of the same clan, the baillie, he that wore the livery or was of the counsel of his lord, his servant, or tenants, &c., were excluded, as well as those connected with him by consanguinity or affinity within the fourth degree. Glassford's Evidence, 420, 421.

By the Mahommedan Law, evidence in favor, whether of a son or grandson, of a father or grandfather, cannot be received. Uncles and brothers are not excluded from giving testimony for or against each other.

The Sonnites *reject all* testimony between husband and wife, but the Shiites adopt a different course. Slaves cannot be witneses, because testimony is of an *authoritative* nature; and as a slave has no authority over his person, he can have none over others. Mills' History of Mahommedanism, ch. 5, p. 359.

(*c*) Accidental—How near the wife came to being received as a witness may be seen in one of the earlier cases.

"It is informed that C., one of the defendants *examined his own wife as a witness;* it is therefore ordered, that the plaintiff may take a subpœna against her in his behalf; and if C. will not suffer her to be examined on the plaintiff's behalf, then her examination on said C.'s part is suppressed." Cary's Rep. 135. 12 Vin. Abr. Evi. 2.

(*d*) 1 Blacks. Comm. 443.

In the case of the party, it has been seen that his interest affords no sufficient ground for exclusion or exemption.(*e*) The affection one feels for another, whatever may be the relationship subsisting, can never be presumed greater than, or even equal to, that which he feels for himself. The common law assumes its equality. Were it so, the reasoning, which justifies the admission of the party, equally justifies the admission of the husband or wife of the party.

But the common lawyer, not satisfied with this fanciful and imaginative union of person,(*f*) would rest his argument on views of public policy and general expediency, derived from the relationship itself.

"There are some instances where the law excludes particular evidence, *not* because in *its own nature it is suspicious or doubtful,* but on grounds of public policy and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence; on this account it is a general rule that the husband and wife cannot give evidence to affect each other, either as it seems civilly or criminally. For to admit such evidence would *occasion domestic dissension and discord;* it would compel a *violation of that confidence,* which ought, from the nature of the relation, to be regarded as *sacred;* and it would be arming each with the *means of offence,* which might be used for very *dangerous purposes.*"(*g*)

It may then be worth our while to scrutinize with some little care the grounds of that supposed policy, which requires the exclusion of evidence *in its own nature neither suspicious nor doubtful.*

The testimony of the wife will be either for or against the husband. If *for* the husband and *true,* or if *for* the husband and *false,* there would seem to be no danger, from that cause, of discord or dissension—the danger to be guarded against by the exclusion.

What is assumed in and by the reason of exclusion, is that the testimony of the wife, (if she be the witness,) in the case supposed, will be adverse to the wishes and interest of the husband, and *vice versa,* and that being adverse, its utterance will induce discord and dissension.

(*e*) "L'un des époux ne peut être appelé en témoignage dans un cause qui devient la sienne, des qu'elles intéresse son conjoint: *Nullus idoneus testis in re suâ intelligitur.*" 9 Toullier, § 286.

"They cannot be witnesses because the law will not acknowledge any diversity between them." Tait on Evidence, 363.

(*f*) A feme covert cannot be a witness against her husband *quia sunt animae duae in carne una*—for it would be if admitted an occasion of perpetual dissension between man and wife. 12 Viner, Abr. 2.

(*g*) 2 Stark. Evi. 103. The reasons for exclusion, as laid down in the several text books on the subject, differ but little.

Phillips says, (vol. 1, p. 63,) "the reason is founded partly on their *identity of interest,* partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an *occasional failure* of justice." So Coke says, "it might be the means of *implacable* discord and dissension between them, and the means of great inconvenience." Co. Lit. 6, b.

In the civil law, the same exclusion exists with a somewhat analogous reason. "Wives and children are not admissible against husband and parents, ob reverentiam personarum et metum perjurii." 2 Ersk. Ins. 979.

It would seem, however, that the wife was examined in preliminary examinations in criminal cases. 8 For. Quar. Rev. 281.

So too, according to the Dutch commentators. Vanderlinden's Institutes, 259.

The testimony here proposed, being assumed to be adverse to the interest of the husband, and to that of the wife, so far as their identity of interest extends—will be either true or false.

If false, and against the interests of the wife so far as her interests are coincident with those of the husband—then, most manifestly, domestic felicity must have passed away—the twain must long ago have ceased to be one flesh. The very hypothesis of perjury by the wife—of perjury with all its dangers, for the express purpose of *disserving* the husband, shows that all the reasons urged for exclusion have lost their applicability.

Their interests being usually identical—whenever dissension is presumed to arise from the circumstance that the testimony of one is adverse to the interest of the other—such testimony, being that of an unwilling witness and being true, is manifestly evidence upon which the utmost reliance may be placed. The testimony of the wife being against her own and her husband's interests and true, and known by him to be true, will it introduce or even tend to introduce implacable dissension? The father or the son, the brother or the sister, are every day called as witnesses, and no evil whatever ensues. Litigation necessarily implies testimony variant from and opposed to the respective interests of the several parties in the cause; yet how rarely does a witness excite any ill will by uttering the truth. Were the supposition correct, the peace of society would be destroyed by the very means adopted for its preservation. The testimony in this case being uttered in accordance with the fact and in obedience to the law, and being known to the husband to be true—will domestic peace thereby be destroyed—implacable dissensions arise? Is the husband one whose affections are lost or even weakened by uttering the truth? If so, they are hardly worth preserving. If so, his children, who are equally under his control while under his roof, should be excluded.

But if the proposed reforms are carried into effect, the husband will likewise be a witness. Being a witness, his testimony coincides or conflicts, in a greater or less degree, with that of his wife. If they testify truly and in accordance with each other, no dissension, unless from such coincidence of testimony, can arise. If they differ, then the presumption is that the husband will perjure himself, and oppress and abuse his wife for not doing the same. The evil thus dreaded, what is the probability of its occurrence? The truth is known to both, and from the intimate relations subsisting between them, neither can have any question, as to what will be the testimony of the other. What greater check on mendacity, if both are witnesses—and if not, on dishonesty, than the knowledge that all attempts at either may be exposed, and that too from a source entitled to the utmost confidence. The husband knows that his wife will state the truth—that such statement, being against her own as well as his interests, will be entitled to and will receive super-ordinary credit—that, if a witness, his own testimony, besides being false, will, from its tendency, as well as from his own station in the cause, be looked on with suspicion—knowing this, will not this very knowledge deter him alike from perjury or dishonesty?

Suppose a brutal and wicked husband, irritated because his wife has uttered the truth, (what a cause for irritation!) should on this account abuse his wife, is that a reason for her exemption from testifying? Because the wife may be abused for performing a legal duty, is that a reason for excusing her from its performance? If it answers for one, it may for all duties; if for one person, it may equally for all persons. Is the law to yield to the temper of an abandoned man? Suppose ill treatment may occur in rare and casual instances, will it be the usual and ordinary result; for the law is framed to meet the general and usual course and not the exception? If it may be reasonably anticipated to occur in the majority of cases, what is the moral situation of that community, where eternal dissension in families is presumed usually to arise from the utterance of truth by either adverse to the other? If these anticipations are not correct, then such legislation would be for the exception and not for the rule.

If correct, then arises a contest between the supremacy of the law and the supremacy of a wicked and tyrannical husband, and the law yields because it cannot adequately protect the wife in the discharge of this legal duty. Because, while able to afford that protection in every other case, in this, it finds itself weak and inefficient; and therefore the family peace of the wrongdoer is to be protected at the avowed and deliberate expense of justice? What, stripped of all disguise, is the argument? The husband wishes to do wrong; the wife, by her testimony, can prevent it, she alone knowing all the facts; the law excuses her—does injustice—for fear, if its own decrees are carried into effect—if, what of all things is desirable, justice be done—that the peace and happiness of the family of the objector, so averse is he to such results, will forever be destroyed. What is the law from which, or what is the people among whom, *such* results from *such* a cause are anticipated?

"It would compel the violation of that *confidence*, which *ought*, from the *nature of the relation*, to be *regarded* as sacred." Confidence, which ought to be regarded as sacred, ought not to be violated. Such is the truism which lies at the foundation of the rule. The argument assumes the truth of the testimony proffered, for if not true, no confidence is violated. The contract, whether entered into in the presence of the wife or any one else, should be enforced alike in each case. The crime, whether committed in the presence of the wife or the stranger, equally deserves punishment. No matter by whom the facts are established—when once established, the law should take its course. The reasoning admits that the truth can, but asserts that it is inexpedient that it should be proved by this evidence. The objection to hearing this evidence, the reason for nullifying the law, is that the confidence between the parties to the marriage contract should not be violated. The facts to be proved are such as may be legally established by all other witnesses—such as are necessary for the enforcement of the law and the preservation of the rights of others—such as are required in a judicial investigation—and such as, if proved by others, violate no confidence whatever arising from this relation. The objection is not to the matter proved, but to the manner by which it is proved. The violation, if any, consists

in the simple utterance of truth onerous to the party objecting, and establishing facts, the proof of which will be followed by such results as the law has ordained. Whose is the confidence thus violated? That of wrong-doers or of felons—it may be. Is it desirable that the wrong-doer or the felon should have either confidants or accomplices? The law should afford no aid direct or indirect; it should oppose every obstruction, every hindrance to the commission—every facility for the detection of fraud and crime. By its exclusion of testimony it encourages fraud and crime and their concealment. Were the law otherwise, the very reluctance, with which such testimony would be delivered, would of itself tend to deter fraud and crime; and the greater the reluctance, the greater would be the security afforded the public. By this rule, one of the strongest safeguards to society is at once abandoned, and the fire-side converted into the asylum of rogues and felons.

"It would be arming each with *means of offence*, which might be used for *dangerous purposes*." The means of offence thus dreaded, what are they? Admissibility as a witness for those who may need such testimony—the liability to testify at the call of others—means of offence, which, if sufficient for the exclusion of the husband or wife, should exclude all, because, from the relationship subsisting between the parties, they will be less likely to be dangerous in this than in any other supposable case. If it be meant, that testimony unattainable from any other source may be elicited, it is the reason of all others why it should be compelled. The means of offence being in this case the truth, for what purposes can it be used? For those for which all testimony is used and for those only. The testimony is true, necessary for the protection of the rights of others, and would be called for to protect those rights, but is excluded because the law considers such a purpose *dangerous*.

An unwillingness to do justice is considered a valid objection to receiving testimony by which alone it may be done. The peace and happiness of felons is thus openly preferred to the enforcement of contracts and the preservation of the laws. The contract made—the crime committed in the presence of the son or daughter—the one is enforced, the other punished; in that of the wife, dishonesty succeeds and crime escapes. Nor is this all. The very relation may be entered into for the purpose of evading the law.(*f*) A debt is due—a crime is committed—the only witness by whom the facts in the case can be established, is a female,—the cause presses—the female is subpœnaed—the dishonest gains of the scoundrel are about being disgorged—the halter is already in imagination pressing the neck of the criminal—there is but one way of escape,—he marries the witness and laughs at the law with impunity.

(*f*) The wife of the defendant in a suit cannot be examined as a witness for the plaintiff without the defendant's consent, though it appear he married her after she was actually subpœnaed to give evidence in the case.

Best, C. J. "I will allow the witness to be examined if the defendant consents, but not without." 3 Car. & Payne, 558. Pedley v. Wellesley, Esq. Best, J., was more liberal than Hardwick, Ch., who would not suffer a woman to be a witness though her husband consented. Rep. Temp. Hard. 264. There was no danger in the permission, as having married to exclude the truth, he would be little likely to *consent*.

Thus far the testimony of the husband(*g*) or wife, as the case may have been, has been assumed as adverse to the respective interests of each other. But they may either require the testimony of the other for the purposes of self-protection. If so, the danger of perjury suffices for exclusion. In the case of the party, its insufficiency as a reason has been seen; in the case of the wife of that party, it is still more apparent. The danger, therefore, arising from this source, will not be any further considered.

But whether the reason, such as it is, exists or not, the law still remains unchanged. The marriage relation is dissolved either by divorce or by the death of one of the parties; the husband or wife are equally incompetent to testify to any occurrences which happened during the existence of that relation, as if no such fact had intervened. In the case of Munroe v. Twisleton,(*h*) which was an action of assumpsit for the board and lodging of an infant child of the defendant, Mrs. Sanddon, who, at the time of making it, was the wife of the defendant, but who had since been divorced from him by act of Parliament and had *married again*, was called as a witness for the plaintiff, but rejected. Whatever might be the testimony of the witness, it is obvious that no domestic dissension could arise, if adverse to the former husband; that no reasonable fear of perjury, if in his favor, existed as reason for exclusion. If then she were the only witness by whom the facts could be proved, here is a failure of justice—with what justification is yet to be seen.

"Miserable indeed would the condition of the husband be, if, when a

(*g*) "A woman living with a man as his wife has precisely *the same interest as if she were his wife.* * * After Lord Kenyon refused in a case of life and death to permit a woman living with a man as his wife to give evidence to protect her life, I shall not admit her as a witness for the purpose of protecting his property." Per Best, C. J., at Nisi Prius, 3 Car. & Payne, 238. This case was overruled in 4 Bing. 610, Bathers v. Golendo, where it was decided, that a kept mistress is competent to give evidence for her protector, although she has appeared in the world as his wife.

If the law of husband and wife *be* correct, the decision, by which the mistress is received, is most clearly erroneous. The more legal ties, which bind the husband and the wife, are not easily dissolved. Not so with the mistress; the existence of that union is entirely dependent on the whim and caprice of her protector. The danger of falsehood from a witness so situated is infinitely greater than from the wife, because her inducements are greater. She knows that the slightest act on her part may dissolve their union—and if anxious to preserve it, she has stronger motives to swerve from the truth to aid him, than the wife, who is less dependent upon her husband. The greater the dependence on one part, the greater the likelihood of perjury—to say nothing of the absurdity, of investing a woman in this situation with a degree of credit, which the law refuses to the wife.

It would seem that if the mistress can be safely received, *a fortiori* can the wife be admitted.

(*h*) Peake on Ev. App. xlv. "I remember, in a case in which I was counsel, Lord Alvanly refused to allow a woman after divorce to speak to conversations which had passed between herself and her husband during the existence of the marriage. I am satisfied with the propriety of that decision, and I think that the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable." Best, C. J., in Ryan & Moody, N. P. Rep. 198, referring to the case of Munroe v. Twistleton above cited. In the case last referred to, Doker v. Hasler, it was decided that the widow could not be asked to disclose conversations between herself and her late husband.

woman is divorced from him, perhaps for her own misconduct, all the *occurrences* of his life, *entrusted* to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice."(*i*) Nothing but the truth is here to be divulged—they being occurrences entrusted by the husband to the wife. There is nothing in the occurrences themselves, which forbids their proof in a court of justice. Indeed the law is solicitous that they shall be divulged. The situation of the husband, is no more miserable when unfavorable circumstances, which are required in a judicial investigation, are proved by one than another. The fact, that these circumstances were entrusted, while the most perfect confidence existed, proves that they are entitled to the highest credence; it shows the value of the testimony. The misery, so pathetically deplored, is neither more nor less than that which a dishonest man must feel, at hearing the truth and receiving justice—misery amply sufficient, in the eye of the learned judge, for exclusion—in that of the unlearned layman, the most convincing argument for admission.

Notwithstanding the supposed friendship between husband and wife, that friendship may pass away, and they may litigate *inter sese*, as well as against others. Excluded when the rights of others are involved, is either received when his or her own interests are concerned?

A refusal to hear would be to permit the severest injuries to be inflicted with impunity by each on the other—unless by some fortunate accident a witness should be present. The wife, accordingly, in case of personal abuse, is now(*k*) received as a witness in all stages of the proceedings—as otherwise she would be unable to protect herself from her husband's ill usage. Were the wife called as a witness for another, the danger of implacable discord and dissension would be regarded by the law as a reason for exclusion. But is not the danger of dissension greater, when the wife swears against her husband *in her own* than in the cause of another? In the one case she would be compelled, though reluctantly, to testify—in the other, it is her voluntary act. Whether she succeeds or not in her own case, will not ill feeling necessarily arise? The offence being the same—the punishment the same—which would the husband be most likely to forgive—voluntary or compulsory testimony, by means of which the same amount of suffering is to be inflicted? The latter unquestionably. Nor is this all. The wife, received as a witness to support her own charge, has all the feeling which interest and revenge ever give—when called for a stranger, her situation is widely different—whatever interest or feeling she has being in favor of her husband. The bias, under the influence of which her testimony would be delivered, would vary in the two cases—in the one against—in the other, in his favor. He would sooner forgive her testimony in the latter than in the former case. Yet in the latter case, the witness is carefully excluded.

Admissible and proper as may be this evidence for the protection of

(*i*) Per Lord Alvanly in Munroe v. Twistleton.

(*k*) 5 Greenl. 407. Soule's case. The earlier authorities permitted the wife to be a witness to ground the prosecution—but refused to receive her as a witness on the trial. 1 Ves. 49. Sedgwick v. Watten, T. Ray, 1, Mary Grigg's case.

the wife—the object proposed may not be obtained—the ill treatment of the husband may be so great, that a divorce is the only remedy which will effectually protect the wife. Litigation for protection. Litigation for divorce—the latter is far the most important in its results. The wife applies to the law for protection from the personal abuse of the husband—the marriage relation is not thereby dissolved. The abuse of the husband can be no longer endured—and she applies for a divorce. Heard in the first instance as a witness to facts, which, whether true or false, cannot but increase the ill will of the husband—and which, not being followed by a separation, expose her more than before to his abuse—now, when if a divorce is granted, a separation ensues, and she will be beyond his reach and control—now, when if successful, there will be an end to all family dissension by the dissolution of the family tie,—she is not permitted to testify.

The wife has received—the husband may require—the protection of the law. The rights of the husband may be violated, and he may be the only witness to their violation—he may see the adulterer in the arms of his wife, and see in vain,(*l*) unless he will bring another to witness with him his own dishonor. Personal abuse may be passed over and forgotten—this never. That abuse may take place in the presence

(*l*) State v. Gardiner, 1 Root, 485. It was decided that in a prosecution against the adulterer, the husband could not be a witness, because "it is certainly difficult to perceive how, that discord and dissension will *fail to arise*, when in collateral proceedings, testimony should be given by one, which charges directly upon the other, the same crime, for the commission of which the party on trial is indicted." State v. Welch, 26 Maine, 30. If the commission of the offence failed to produce discord and dissension, it would seem late in the day to expect them to arise from the mere giving of testimony in relation thereto.

The common law refuses to permit the husband or the wife to prove the adultery of the other, whether on the trial of an indictment against the adulterer, of a libel for a divorce, or when the question relates to the legitimacy of offspring.

The Mahometan law prohibits proof of this offence, or what amounts to the same thing, *requires four witnesses* to establish it, as if it were to be expected that those about to commit adultery would court publicity and invite witnesses.

"Le législateur exige ici quatre témoins, dans l'intention de rendre la vérification judiciaire plus difficile et plus imposante, parce qu'il vent, au point de vue de la morale, que le musulman couvre et respecte l'honneur de son prochain, ne jette pas de honte sur les deux individus coupables et sur leurs familles. Le Prophéte a dit; 'Celui qui couvre le musulman son frére, celui-la verra aussi, son honneur couvert de la bonté divine au jour de la ressurrection.' D'autre part, quoique le meurtre soit un plus grand crime que la cohabitation illicite, deux témoins suffisent pour etablir une preuve judiciaire, par la raison que l'on ne peut se figurer de cohabitation illicite sans le concours de deux coupables et dés lors, la culpabilite de chacun d'eux doit être attesteé par deux témoins.

"Les quatre témoins (pour que leur déclarations soient admissibles) doivent être parfaitement d'accord sur le moment et sur le lieu ôu ils ont vu (les coupables et sur les autres circonstances de détail du fait. Si donc les témoins ne sont pas d'accord sur le lieu du crime, sur le resistance de la femme, sur l'exactitude du fait de cohabitation illicite, sur le lieu a l'ost ou a l'ouest de la maison, sur le moment ou les coupables ont éte vus en action, sur le mode d'accomplissment de la copulation, la femme, étant debout ou couchée, ou tournée sur le côte guache ou sur le côte droit, ou placée dessous ou dessus l'homme, etc., le témoignage est nul.") Jurisprudence Musulman, par Khalîl Ibn-Ish'âk' traduit par M. Perron, 5 tome, 237.

But what matters it whether a percipient witness is excluded because he or she is husband or wife, or is disregarded because he cannot bring three witnesses to corroborate every fact seen by him. In either case the guilty escape.

of his family, whose testimony may be used against him—but adultery is emphatically the crime of concealment. The fear of destroying domestic peace(*m*) and of introducing discord, which loses its influence as a reason for exclusion, when that peace has been destroyed by a passionate and despotic husband, is seen to be all powerful when the wife has inflicted deeper wounds than are ever caused by personal violence.

The husband excluded—the adulterer and the adulteress exempted from testifying, when the adulterer is on trial or the husband is litigating for a divorce—how stands the law when the question of the legitimacy of the issue of that adulterous intercourse is to be settled? Why, as might be anticipated, when the law, like the offspring, is of uncertain paternity. The husband not admitted to convict the adulterer or the adulteress, "*because it would be against common decency and good manners that such evidence should be received,*"(*n*)—the wife, probably for the same reason excluded, when the husband applies for redress,—when the question of paternity is raised,—is received from the *necessity* of the case to prove the *criminal* connection.(*o*) The wife, a witness from necessity to prove this connection, yet is not a witness to prove *non access*—it being against "*decency, morality and policy*" that she should be permitted to prove that fact;(*p*) or perhaps the exclusion may arise from some danger of disturbing the family peace by proving that negative fact. Necessity v. common decency. The fact to be proved the same, to prove the child illegitimate, necessity requires the admission of the husband or wife for that purpose; common decency forbids that they should either testify to the conviction of the adulterer. Necessary to bastardize the issue of that adulterous intercourse, the necessity ceases when the husband prays for relief from the bonds of matrimony. Decent, moral and politic, as it may be in the former—it becomes the height of indecency, immorality and impolicy, to receive this evidence in the latter case. The use to be made of the fact—the purpose for which it is required—renders the testimony of the same witness competent or otherwise, as the case may be.

The duties of the paternal relation should not be imposed when that relation does not in fact exist; and when existing, the father should not be relieved from their performance. The rights of inheritance are based on descent. The illegitimate should not inherit as if legitimate,

(*m*) 5 Greenl. 408. Soule's case.

(*n*) 11 Mass. 442, Canton v. Bentley. The husband is not received as a competent witness to prove adultery on the part of the wife, even in a case *inter alios*, because "it would be entirely against *good manners and common decency that such evidence should be received.*" It is undoubtedly *against good manners and common decency* that such facts should exist—but the crime having been committed, it is difficult to perceive why it is any more an outrage on good manners, for the husband to prove them than any one else! The outrage is in the thing proved—not in the witness.

(*o*) 6 Binney, 286, Comm. v. Shepherd. The mother is not a competent witness to prove *non access* by the husband, but that being proved by other evidence, she is a competent witness to prove the criminal conversation. Parker v. Way, 15 N. H. 45.

(*p*) Cowp. 594, Goodright v. Moss. Still she is competent to prove access. B. N. P. 113.

nor should the legitimate be wrongfully deprived of what of right belongs to them. In the grave and important questions of paternity and inheritance the law dimly gropes in search of the truth, aided only by the feeble and flickering light of conjectures and presumptions, while the husband and wife, with sealed lips, await the dubious and uncertain result. If there was access, the fact is known to the parties, and its avowal would little tend to the disturbance of domestic harmony. If there was not, that is equally well known, and the disavowal of access would hardly produce discord, for the peace of the family must long before have been destroyed.

"It is a rule," remarks Lord Mansfield,(q) "founded on *decency, morality and policy*, that they shall not be permitted to say after marriage, that they have had no connection, and therefore *that the offspring is spurious*, more especially the mother, who is the offending party." But if the offspring be spurious, why not say it? If the fact be one in issue, why more indecent, immoral and impolitic for the mother than for any one else to say it? It is a fact to her disgrace, and one she would be little likely to admit if not true. She might assert it when it did not exist, but she would never deny it when it did. The indecency, the immorality, the impolicy is in the thing done. The offence is neither aggravated nor diminished by the circumstance that proof of its existence comes from one rather than from another. If the wife, who is "the *offending* party," is to be excluded, no reason is perceived for the exclusion of the husband, who is the *offended* party.(r) But the facts in cases of this description rest especially in the knowledge of the husband and wife—and the necessity of their admission is abundantly apparent, unless the "decency, morality and policy" of the law require that spurious offspring should inherit the estates of those who never begat them, or that legitimate children should be deprived of what is of right theirs.

The admission of the wife *de facto*, in case of an indictment against the husband for forcible abduction and marriage, is another striking exception to the general law on this subject.(s)

(q) Goodright v. Moss, Cowper, 591.

(r) It was held in the King v. Inhabitants of Sourton, 5 Ad. & El. 178, that neither husband nor wife could be admitted for the purpose of proving *non access*.

"Suppose," remarks Littledale, J., "in a dispute respecting legitimacy, it were an issue directed by the Court of Chancery, whether the husband and wife had not had access to each other at such a time: I should say that neither of them could be required to answer any question tending to prove *the negative or affirmative* of that issue."

In Patchell v. Holgate, 3 Eng. L. & Eq. 100, eight years after separation the wife had a child. The court refused to receive the affidavit of the husband that he had had intercourse with the wife since the separation.

The mother of a bastard child—who is a married woman—though competent to prove the illicit intercourse, is not competent to prove *non access*. People v. Ontario, 15 Barb. 286.

In an indictment for fraudulent abduction and marriage, the wife is received. Regina v. Yore, 1 Jebb & Symes, 563; People v. Carpenter, 9 Barb. 580.

According to some authorities, in such case the wife would be admissible for the husband. State v. Neil, 6 Ala. 685.

(s) The wife is admissible notwithstanding her subsequent assent and cohabitation. 1 Greenl. Ev. § 347.

Whether the marriage be legal or not is the question to be established. The wife *de facto* is received. Being the wife *de facto*, the probability in the absence of all proof is, that she is the wife *de jure*—a probability strong in the ratio of marriages with consent to those by force. The cause comes on for trial. To admit the wife *de facto* to prove that she is not the wife *de jure*—is to assume in the outset the guilt of the defendant—to assume the competency of an incompetent witness by whom, when admitted, her competency is to be established. The laws of war go on the ground that neither party has a right to assume its antagonist absolutely in the wrong and itself in the right. The conflicting parties stand *in pari* as to right by its laws. The parties litigant stand differently before the court. The wife *de facto*, for the purpose of rendering her admissible, is assumed *not* to be the wife *de jure*—the husband guilty of the charge—and on this assumption the wife testifies. If this assumption can be made in one, why not in all cases? If to convict the husband, the marriage may be assumed to be null and void, why not make the same assumption, to lay the foundation for establishing his civil or criminal liability?

In this as in all disputed cases, there are two sides; if the wife be received to prove certain facts, because by the hypothesis, which justifies the exception, the knowledge of the facts to be proved by her is confined exclusively to the husband and wife—then the argument arising from this necessity equally establishes the propriety of permitting the husband to disprove in this, as in all other cases, where the exception has this foundation, the testimony of the wife against him. Necessity, however, never applies to but one side of a cause. The defendant must disprove the necessary but false testimony of his wife as best he can, by other testimony than his own.

But the wife may fail—and the marriage be established, or the assault may be disproved. The wife has in these cases testified against her husband—and will not implacable dissension arise? or, is it to be assumed, that all complaints are true—and will be credited—for if not true, or if being true they are not believed, then the danger which lies at the foundation of the rule, applies here with extraordinary force.

The rule and its exceptions have been considered. The administration of the law must depend on the rules of evidence by which the facts are to be elicited. The importance of the subject, therefore, affords ample justification for its extended discussion.

CHAPTER X.

ATTORNEY AND CLIENT.

We have already seen the felon, through the mistaken clemency of the law, exempted from the dangers and terrors of personal cross-examination, and his domestic fireside converted into an asylum of secrecy and protection. To give him entire or almost entire impunity, it only remained to afford him the aid of an hired defender, (*qr.* accomplice?) upon whose skill, energy, and *secrecy*, the most implicit reliance might be placed, whatever the fraud to be perpetrated, the crime to be committed or the punishment to be avoided; who should not merely be untrammelled by any fears of legal consequences or of loss of public reputation, but whose very reputation and emoluments should depend upon and be in the proportion of the number and the atrocity of the crimes of those who should escape through his agency, and who should neither be compelled nor even received to testify to any facts communicated to him by his guilty principal. More than this, if consulted in the enactments of the penal code, he would hardly dare to ask, unless the whole penal legislation of the land were to be repealed.

That such should *not* be the law would seem to be the obvious will of the legislature, as expressed by the terms of the formula, in which each attorney, previous to his admission, swears that "*he will do no falsehood* nor consent to the doing of any, and if he know of an intention to commit any he will *give knowledge thereof* to the justices of the court *that it may be prevented*; that he will not wittingly nor wilfully promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same;—that he will conduct himself according to the best of his knowledge and discretion, and with all good fidelity as well to the courts as to his clients."(*a*) The words of the oath indicate most clearly the intention of the legislature. They cannot mean that he shall give knowledge to the court of all falsehoods and crimes, *except those* of the client, or *except those*, which may be professionally communicated, for that is the duty of the attorney in common with every other citizen; and it can hardly be supposed, that the attorney is so much more neglectful of the ordinary duties of good citizenship—that he alone needs an oath to remind him of his duty. He alone of all citizens cannot be supposed

(*a*) St. of Maine, 1821, c. 89, § 1. By the code of Justinian the advocate was required to take an oath in every cause in which he was engaged that he would use his utmost endeavors to procure for his client, that which he conceived to be just—that he would not advocate a cause that he knew to be unjust, and that he would abandon a defence which he should discover to be supported by falsehood or iniquity. Cod. Just. 3, 1, 14.

to require the extraordinary obligations of an oath, to expose such crimes as are within his observation, whoever may be the criminal. The only *falsehoods or crimes*, which an attorney would be loath and unwilling to expose, are those of his client; and these are what are specially provided for by this oath. That he should for gain lend himself to the dishonest and fraudulent purposes of his clients, seemed sufficiently probable, to require special legislative interposition to prevent. Nevertheless, this oath, thus express and explicit in its language—not forbidding but on the contrary expressly commanding the disclosure of any falsehood, or the *intention* of doing of any, in order to its prevention, by some magical interpretation, has been construed as indicating something the reverse of its obvious meaning. Fidelity to the client is required; but is it not fidelity in asserting his *honest* claims? Is *more* than that his duty? Fidelity to the court too is required; and the very terms of the oath assume there is no necessary incompatibility between them. But if there were, it would seem that the duty one owes the court, as the guardian of the great interests of the public, would be paramount to any duty one could possibly owe a client seeking to defeat those greater interests—to evade the laws or commit fraud. With the language thus explicit, to conceal the fraud or crime of a client, would seem to be a violation of the oath taken. But not merely is it not so, but from some supposed great principle of public policy, the attorney is not merely exempted from, but the court refuse, even if he be willing, to receive his disclosure. The sworn officer of the court is the only citizen,(*b*) into whose not reluctant ears, all fraud and crime may be poured with impunity. However willing he may be, if he "know of any intention to commit falsehood, to give knowledge thereof to the court;" he gives knowledge in vain, the court will not hear.(*c*) To admit him, to use the language of Viner, would

(*b*) This privilege has been extended to any person employed to manage a cause as counsel. Bean v. Quinby, 5 N. H. 94, *contra*, Holman v. Kimball, 22 Vermont, 555.

(*c*) An attorney, consulted as to a fraudulent transaction, is exempt from testifying to it. In Skinner's Rep. 404, an attorney, who had drawn an agreement between a sheriff and his under-sheriff, was examined to prove it a *corrupt one;* but the Ld. Ch. Justice held him not bound to answer. See also Cromak v. Heathcote, 2 Bro. & Bing. 4; Foster v. Hall, 12 Pick. 89.

Whether such evidence would be received in equity is somewhat doubtful. In Clay v. Williams, 2 Munf. Rep. 105, the marginal abstract is "Quere. Whether the evidence of a person employed by both parties as an attorney or scrivener, to write a bond for a *fraudulent* purpose, be admissible to *prove* the fraud?" To this quere the reporter has appended a note, most strikingly indicative of *the certainty and precision* of legal rules. "It seems from Brookes, J., and Tucker, J., opinions in this case, that they considered such testimony admissible. Roane, J., is *pointedly contra;* and Flemming *said nothing on the point. Ideo Quære?*" Quære—in æternumque quære—and the inquirer gets no better solution of his doubts.

Such is the law in civil cases. The criminal law is the same. In 8 Mass. Rep. 370, Mr. Dane, having been summoned by the grand jury to testify in relation to a forged note in his hand, which the solicitor general was desirous to lay before the grand jury, believing that public justice might thereby be promoted, declined testifying and afterwards came into court and offered to deliver the paper to the clerk to remain in his keeping, if the court should advise him that it was his duty so to do.

The court say, "We can give no such advice." See 1 Phill. Ev. 132, Smith's

be a "manifest hindrance to *all society, commerce, and conversation.*"(*d*)

It is obvious, that this evidence will consist ordinarily of the *confessorial* statements of the client—that it will partake of the nature of confessions; and that to the extent, in which it exists and may be required for judicial purposes, it is precisely as important as the same amount of similar testimony, coming from any other source; and that the reasons, which justify the admissions or confessions of the party, apply equally in this, and would equally require the testimony of the attorney, unless they are counterbalanced by important considerations of expediency.

The question to be considered is not the limited or unlimited right of defending all—it is the expediency or inexpediency of exempting all communications made by the client, from being divulged in the course of any judicial investigation whatever, in which they might be important in producing correct decision. Professional prejudice as well as legal authority protecting with inviolable sanctity all communications made to the attorney professionally, it is for us to investigate the *reasons, policy,* and *extent* of the rule. For while all the authorities agree in its existence, they all differ more or less in the reasons on which it is based, and the extent of its application.

"Neither counsel nor attorneys ought to be *permitted to discover* the secrets of their clients, though they *offer* themselves as witnesses for that purpose. This is the privilege of the *client* and not of the attorney; and it is founded on *the policy* of the law, which will not permit any person to betray a secret with which the law *has entrusted him.*"(*e*)

case. In 3 Burr. 1687, the court advised the attorney to give it back to the client; but *quære,* as to that, where could it be in safer keeping?

The law would seem to be different in Scotland, see Alison's Prac. Cr. L. S. 473. In 6 Ves. 281, Wright v. Mayer, per Ld. Eldon, "I have never heard at law of a *subpœna duces tecum* upon an attorney to produce the papers of his client. I remember, in a case of forgery at Durham, a man served with a subpœna to produce a forged deed. It has sometimes been done in criminal cases, but it *is not a precedent to be followed.*"

The earlier authorities show the court to have doubted on this point; see 12 Mod. 341. Question was whether one who had been an attorney for defendant should be compelled to be a witness; Damrill, J., said, "this being a criminal matter he might—but not so in a civil matter;" but Pratt, J., overruled it. After a very elaborate review of the authorities in The Bank of Utica v. Mersereau, 3 Barb. Ch. 535, Walworth, Ch., expresses the opinion that the privileged relation of attorney and client *ought* only to exist for *honest purposes, and not to enable the client to perpetrate a fraud, or to violate the laws under the advice of counsel or through any professional aid, and his regrets that the law is settled otherwise. Contra* Follet v. Jeffery, 1 E. L. & Eq. 172. Tait on Ev. 385.

(*d*) 12 Vin. Ab. Ev. 38.

(*e*) M'Nall. on Ev. 239.

In the Roman law, "tutors and curators are, from a suspicion of parental favor, accounted improper witnesses for their minors, and *advocates and agents* for their clients, in the causes in which they are employed, but not in other causes—but they may be *against them*—but they are not permitted to discover on oath the secrets of their cause." 2 Ers. Ins. 980. Desquiron, Traité de la preuve par témoins, 393; see Cox v. Williams, 17 Mart. Rep. 141.

The advocate, attorney, or guardian, cannot be witnesses *in causes* which they shall defend in the name of the parties, unless produced or called *by the opposite party.* Institutes of Spain, 324.

If then it be the client, whose interests are alone to be consulted, to ascertain when and on what occasions he will object to the disclosure of confidential communications, it is only required to ascertain, when and on what occasions he would himself be unwilling to testify.

If the client is in the right, it can hardly happen but that his confidential communications will show that fact. The attorney, if called, will aid, and cannot injure his client, who cannot possibly have any objections to having his own favorable statements laid before the jury, at the instance of his opponent.

It is urged, by way of argument against any change, by one of the ablest as well as most liberal advocates of the rule, that many evils would result from its alteration, and among others he instances the case of *a flaw* in the title of a client, and then asks, is he bound to secrecy or not?(*f*) The necessary implication from the supposed case is, that *except* in cases of that class, the objection does not exist. The reason of the exclusion is, lest the rightful owner should lose his title from some supposed merely technical defect, having no relation to the intrinsic merits of the case, which the attorney, having learnt in the course of his professional intercourse, might divulge. But do *flaws*, mere technical flaws, vitiate just and honest titles? If so, the obvious remedy would be to repeal the law, which defeats honest titles by mere flaws. The existence of a bad law is no argument for introducing another bad rule to modify or diminish its injurious effects, when it causes other evils still greater than those to be remedied. The fear is, that the law will be carried into effect. The law ought not to be such, that it is a result to be lamented, that the title is ultimately placed where the law designs it to be. If it be a *real* defect of title, so far as the ends of justice are concerned, it is not, nor does this reasoning suppose it to be, a valid objection, that the evidence places the title in the hands of the real owner. It is only the danger of the destruction of titles by flaws, that excludes. Repeal that rule of law, which thus absurdly defeats the ends of justice, and the objection at once ceases; for it is not in fact an objection, so much, to the admission of the attorney, as to a *bad rule* of law, which is thus made effective in consequence of his testimony. The evil is that the law is carried into effect.

"If he be not bound to secrecy he may without blame immediately communicate his discovery to the party interested."(*g*) To this danger an answer has already been given—repeal the law. But, flaws out of the case, there is another one equally obvious; though compelled to answer, it by no means follows that he should volunteer his information. The friend, the brother, the son, may be, nay, are, compelled to disclose the most sacred and confidential relations; but there is a manifest and recognized difference, between proffering this testimony uncalled for and testifying in obedience to the law, one which justifies the physician, the clergyman or the friend, and would equally justify the attorney. "It is

(*f*) Liv. Crim. Code of Lou. 277. "It would be most mischievous if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge *a flaw*." 2 B. & B. 6.

(*g*) Liv. Crim. Code of Louis. 277.

founded on the policy of the law, which will not permit *any person* to betray a secret, with which the *law has entrusted him.*" The friend, who should voluntarily betray the communications of a friend, would for ever forfeit confidence; the attorney, who should voluntarily do the same, would forfeit the confidence of his clients. But suppose he should, it would no more prevent confidence being reposed, than would the single instance of one friend becoming a Judas destroy all friendship among all men. An instance of one or the other event would not interfere with or change the ordinary conduct of men, but would only designate particular instances of mistrust.

It might be difficult to discover, how these are any more "entrusted" by the law, than any other communications. But suppose they are so "entrusted," it by no means follows that they should be. This is merely another mode of stating the law as it is, but it furnishes no argument whatever in favor of its existence. Like all the logic of the lawyer, it consists in an assumption of the question at issue, which being assumed, the desired inference very naturally follows. Were the law changed, no confidence could be betrayed; all communications would be in subordination to the general law of the land, and there could be no breach of confidence, when the law compels the disclosure. The friend, who testifies in obedience to the law, though ever so much to the injury of a friend, betrays no confidence. The same answer, which Lord Mansfield, in the Duchess of Kingston's case, gave to Mr. Hawkins, would apply equally here. "A surgeon has no privilege to avoid giving evidence in a court of justice, but is bound by the law of the land to do it. I take it for granted if Mr. Hawkins understands *that*, it is a satisfaction to him, and a clear *justification* to all the world. If a surgeon was voluntarily to reveal these secrets, he would be guilty of a breach of honor, and of great indiscretion; but to give that information in a court of justice, which, by the law of the land he is bound to, will never be imputed to him, as any indiscretion whatever." Were the law changed, the same reasoning would equally apply to and justify the disclosure of communications made to an attorney.

The writer, whom we have before referred to,(*h*) Mr. Livingston, puts the case of an innocent individual who has been accused of theft. Money, consisting of uncommon coins, has been stolen. The accused has passed coins of that description. There are other circumstances against him. He has no proof of the manner in which he acquired the pieces in question. He is innocent, but confessed to his counsel, that, about the time of the loss, he was in the chamber where it occurred. The other circumstances would not be sufficient for his conviction, but this added, would have that effect. Shall it be disclosed? Were it morally certain an incorrect inference would be drawn, it should not in that particular case. Were it certain in all cases of this description, incorrect inferences would be drawn, the evidence is properly excluded. The argument assumes that evidence will be misjudged. Is that a correct assumption?

(*h*) Liv. Cr. Code of Lou. 278.

The fear is, that, being innocent, he will disclose certain facts, which would not be otherwise known, and which would lead to an unjust conviction. It may be safely assumed, that, if innocent, his disclosure to his counsel, if believed, will show that fact. The fear is, that it will not be credited. The danger is of incorrect inference from true testimony. The argument, if good for anything, would exclude all testimony, except that which excludes the possibility of error—in other words, of all testimony, as there is none, about which some error may not arise. The argument, if good, applies with peculiar force to the exclusion of all confessions, by whomsoever related—for there is no more danger of error from the same confession, coming from the lips of an attorney than from the lips of a friend.

But this is the privilege of the client. Would he oppose the examination of his attorney, for fear his very defence, being true, and coming from his own lips, would lead to his conviction? If the facts disclosed are not susceptible of proof from other sources, and he objects, (and his objections are what the law considers,) to having his own explanations go as evidence to a jury; were the facts proved, it would be what he would of all things desire. If without proof, would he object to his own statements going before a jury, because a part taken by themselves might lead to his conviction? If believed, it will be what he wishes? Will they not be believed? Is it to be assumed, that with the presumptions of law in his favor, any danger could arise from the admission of his statements, equal to a total exclusion of all the facts, upon which he relies for defence. It is to be remembered, that the very writer who would exclude the attorney, would receive the party.

The client in the wrong, his confidential communications will be either true or false. If false, by the very assumption they will be favorable to himself, and being so favorable, will the client object to his own favorable, self-excusing, self-acquitting statements, however false they may be, for though false, they are his only reliance? The client in the wrong, and his confidential communications disclosing that fact, he will obviously object, but his objection is that already considered, of the guilty to punishment, and of course to any evidence which may lead to punishment, an objection, which if of any avail, applies with more force to the punishment, after conviction, than to the evidence which may be supposed only to lead to it, (an objection, the very statement of which is an absurdity.)

"The foundation of the rule(*i*) it is not difficult to discover. It is not on account of any *particular importance which the law attributes to the business of the legal profession or any particular disposition to afford them protection*,—but it is out of regard to the *interests of justice*, which cannot be *upholden*, and to the *administration* of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege *did not exist at all*, every man would be thrown on his own legal

(*i*) Per Lord Brougham, in 1 Mylne & Keene, Ch. Rep. 98. Greenough v. Gaskell.

resources; deprived of all professional *asistance*, a man would not venture to consult any skilful *person or would only* dare to tell him half of his case."

Suppose it be true, as is assumed, "that the administration of justice cannot go on without the aid of men skilled in the law," yet as there is no "particular importance which the law attributes to the business of the legal profession, nor any disposition to afford them protection," this affords no reason for the granting any privilege. The ability of the profession may be admitted, the importance of men learned in the law may be conceded, but all that affects not the privileges to be granted. There is no necessary nor conceivable connection between them. The privilege affords neither learning nor skill. Nor is it material for whose supposed benefit it may be granted, the result is thereby in no way altered.

"If the *privilege* did not exist, every one would be thrown on his own resources." Such would be the case were there no such profession; but if the profession existed, it would not. Why the loss of a privilege *conferred on the client* should destroy the profession, is not very apparent. Professional skill would as well exist, professional aid as will be given, without as with the privilege. The necessity of this advice, the value of his services, would be neither lost nor diminished, nor would the client be any more thrown on his own resources, in the one case than the other, unless he should choose voluntarily to waive resorting to the profession for aid.

"*Deprived of all professional assistance*, a man would not venture to consult any *skilful* person, or would only dare to tell his counsel *half*." If deprived of all professional assistance, it would be because there was no *skilful* person to consult. If there was a skilful person to consult, he could hardly be said to be deprived of all professional assistance. If skilful, why should he not venture to consult him? His skill would be the same, whether law should remain changed or unchanged.

"He would not venture to tell half."(*k*) Why not? Certainly not, because the assistance to be obtained would be any the less skilful or efficient. The counsel, to whom application was made, could render the same amount of service, whether his instructions were given without or with the pledge of secresy. Are the instructions withheld? Is but half told? If so, the reason is not that the professional skill is any the less, as is taken for granted it would be, but that *no more* than half will bear telling.

"This privilege . . . is the privilege not of the attorney but of the client, and is founded on this consideration, that there would be *no safety in dealings with mankind*,(*l*) if persons employed in transactions

(*k*) "It would be destructive of ALL BUSINESS if attorneys were to disclose the secrets of their clients." M'Nall. Ev. 240. Is the *maximum* of business the only object? That it would be destructive of business, if the attorney should be compelled to disclose the secrets of his clients, may be admitted, but it would be of that precisely which should be destroyed. *All* business is not to be encouraged. The *business* destroyed would be that which the client dare not disclose to his attorney; and is such business to be encouraged?

(*l*) "It would not be *safe for clients* to communicate to the attorney *all proper*

were compelled to state that which they have learned only by this species of confidence."(*m*)

"No safety" the reason for exclusion. Whether there is safety or not would depend on the *dealings*, which would form the subject matter of the disclosure. As, however, there should be no dealings which will not bear disclosing, and as, if there should be any such, they ought to be disclosed, there would seem to be no legitimate ground for exclusion, unless there should be found some great principle of public policy, in concealing falsehood and protecting injustice. True, there would be no safety to the corrupt,(*n*) and why should there be? The honest, having nothing to conceal, would be safe; the *proof* of corruption and fraud is *his only* safety—its concealment, that of the dishonest. Whose safety *should be preferred? Whose is?*

"*No safety*, if persons employed *in transactions* were compelled to state that which they have *learned* only by this species of confidence!" And should there be safety, if the transactions when disclosed would destroy it? Are the *transactions*, which are *learned only* by this species of confidence, of such a character as at once to destroy the safety of the client! If so, what transactions! What a client! What an attorney! What a law, avowedly to conceal for the protection of guilt.

The argument likewise assumes, that there is something peculiar to this "species of confidence," which will justify a departure from the ordinary principles of law. Professional aid may be required and confidence may be necessary in the interchange of facts and opinions between client and counsel. But confidence and assistance of some sort is necessary in the ordinary and multiplied affairs of life—in the exchanges, sales, and contracts of every description, which occur in the daily transactions of business, yet that does not exclude from courts of justice, facts which may have been ever so confidentially communicated—if necessary for the purposes of justice.(*o*) "As the law attributes no peculiar importance to the business of an attorney,"(*p*) it is difficult to perceive, wherein consists the difference between the confidence which exists between the physician and patient, between the confessor and penitent, the trustee and *cestui que trust*,(*q*) and indeed in all fiduciary relations,

instructions," &c. M'Nall. 244. Not safe to communicate *proper* instructions! They are the very ones which it would be safe to communicate. Proper instructions could harm no one, *improper ones* might. Is not the rule made to conceal *improper ones*, the instructions of unjust clients to unscrupulous attorneys, dishonorable alike to the giver and the receiver? Who but such would object?

(*m*) Per Lord Eldon, in Parkhurst v. Lowter, 2 Swanston's Rep. 216.

(*n*) As there is now. See 12 Pick. 89; 2 B. & B. 4.

(*o*) In the Duchess of Kingston's case, Lord Barrington objected to testify, because as a *man of honor* and regardful of the rules of society "he could not reveal what had been confidentially communicated to him." Lord Camden, in answer, expressed to the court a hope that "they should not think it befitting their dignity, to be debating the *etiquette* of honor, at the same time they were trying *lives and liberties*," and he was compelled to testify.

(*p*) Per Lord Brougham, as before cited. Broad v. Pitt, 3 C. & P. 518; C. J. Best,—"I think this *confidence* in the case of *attorneys* is a *great anomaly* in the law."

(*q*) By recurring to the earlier authorities it will be perceived how much exclusion or admission is a matter of accident:

In Vent. R. 197, Jones v. Countess of Manchester, the witness, as *trustee* for his

from that subsisting between the client and attorney, and why different rules should obtain in the last from those adopted in the former cases.

"They are considered identified with their clients and of necessity entrusted with their secrets;"(r) "and standing *in loco* of the client," and as the client is not examinable, the attorney, who is his legal representative, is likewise exempt from examination. The unprofessional agent, though equally representing his principal, and that too when the most important questions are involved, is received. It would seem obviously to follow, that, whenever the client is received, the attorney should likewise be a witness—the reason of the rule ceasing. The rule is nevertheless preserved with equally inviolable integrity.

In chancery,(s) the party is compelled to produce his deeds and papers, to utter his secret and unuttered thoughts, his knowledge, his impressions, his belief. The party and his unprofessional agent examined, an objection would hardly seem to arise, on his part, to the examination of his professional agent; but such is *not* the case. Instead of that, the objection seems to apply with redoubled force.

"The *course of justice must stop if such a right exists.*(t) No man will dare to consult his professional adviser with a view to his defence or the enforcement of his rights. The very case which he lays before counsel may contain the whole of his evidence. . . . . If it be said that this court compels the disclosure of whatever a party has *at any time said* respecting his case; nay, even wrings his conscience to disclose the belief, the answer is—that *admissions not made or thoughts not communicated* to professional advisers are not essentially necessary to the security of men's rights in a court of justice."(u) If the course of justice is to stop, the argument is unanswerable. The objection relied on is, that each party will be enabled to know the case of his opponent. Were it so, the advantage or disadvantage would be equal and reciprocal. Were the parties in the outset, before litigation had progressed, to disclose to each other their several claims and counter-claims, and the proof relied on severally to sustain each; would not innumerable lawsuits be prevented? Would it not be infinitely more conducive to the ends of justice, that parties should litigate understandingly, than at every step of the proceedings to incur the risk of injustice by the introduction of some unexpected and perhaps untrue evidence? Why do courts of equity exist? Why are bills of discovery granted and disclosures compelled, but that the party seeking may ascertain, and the party answering may give, facts which can in no other way be obtained. If the party is compelled to disclose, why exonerate his agent? The argument,

sister, had a key to a box in the custody of a stranger, containing writings important for the plaintiff, which he refused to deliver up, because, as he said, they *would impeach* the estate of his sister, and it would be a breach of his trust imposed on him, which he held *inviolable*.

The court told him they could not *compel* him to deliver up the key; but Hale said it would *be more advisable* for him to do it, &c.

(r) 4 Munf. Rep. 286, Parker v. Carter, M'Nal. Ev. 239.

(s) The attorney may be made a party to a bill in case of fraud; see Bowles v. Stewart, 1 Sch. & Lef. 227. Why not equally well at common law?

(t) Per Lord Brougham, in Bolton v. Liverpool. 1 Mylne & Keene, 94.

(u) Walton v. Ingolby, 1 Mylne & Keene, 61.

if valid, applies with equal force in case of the principal as that of his agent.

"The answer is, that admissions *not made*, or thoughts not communicated, to professional advisers, are not essential to the security of men's rights in a court of justice." It is very obvious, that the professional adviser cannot very easily disclose "*admissions not made, and thoughts not communicated.*" But the party can, and is compelled to, communicate not merely *all* facts within his knowledge, belief or impression, but "admissions not made and thoughts not communicated;" that is, all that, and *more than* his attorney could by any possibility disclose. In other words, increase the objection which is urged against the attorney's admission, and it vanishes. If certain facts are disclosed by the client, the course of justice runs smoothly on—if by the attorney, "the course of justice must stop." The difference is in the lips which utter.

Were the party a witness, as in equity, the admission of the attorney would be a matter of less importance than in the case of his exclusion. But even then the right to his testimony would be valuable, as operating as a check on the client—on the attorney—conducive to the mutual integrity of each.

"The attorney is obliged to conceal his client's secrets, and every thing he is entrusted with is *sub sigillo confessoris.*(v) Being so, is the confessor a witness to disclose the secrets of his confessional? Reformation, not the escape of the criminal, is the object. It is the confidence between man and the minister of God. The religion, and its rites, being authorized by law—the permission of this evidence would be, in effect, to repeal the law by which the confessional is sanctioned—would be to debar the penitent from the exercise of a religious duty enjoined by his faith. Are these secrets entrusted by the law? Shall secrets entrusted by the law be betrayed?" Who does not perceive that the argument for the attorney's admission applies with increased force here.(w) Who does not perceive, that "policy," "entrusted by law," "betraying of secrets," are the magical terms, which are potent to exclude or admit, according as the judicial sorcerer lists?—that had

(v) Bac. Abr. Ev. A. 3. The exclusion of the priest is the only one sanctioned by Bentham.

(w) The common lawyer almost protects communications made to a clergyman. "I for one," says Best, C. J., "will never *compel* a clergyman to disclose communications made by a prisoner; but if he *chooses* to disclose them, I shall receive them in evidence." 3 C. & P. 518. It would seem that they are exempted from testifying by statute in New York. See 13 Wend. 533.

The same reasoning, which would justify the exclusion of the attorney and priest, would likewise justify that of the physician. The confidence reposed in him is that of the sick and dying bed, it is the confidence of the chamber of death. It is not reposed for purposes hostile to the best interests of society; yet he too is received as a witness, the lamentations of the jurist to the contrary notwithstanding. See M'Nall. on Ev. 252; 1 M. & K. 98.

So too the friend. "It is hard in many cases to compel a friend to disclose a confidential communication, and I should be glad, if, by law, such evidence could be excluded." Per Buller, J., in Lendzay v. Talbot. Had the learned judge but lived a century or too earlier, who can doubt that the reformer would have had more exclusive rules to war against?

By the law of Scotland the secret of the agent is the secret of the party, and even when called in a court of justice, the court will shut his mouth. Kerr v. Duke of Roxburgh, 3 Mur. 141.

these been applied some centuries ago to the confidence of the confessional, to that of the physician, or even of friendship, that exclusion would have obtained in all those cases.

Were the law changed, what consequences would follow. The communications of clients would be unreserved or not. If unreserved, so far as regards the intercourse between client and attorney, it would remain unchanged. If all facts were *not* disclosed, it would be because the client, being guilty, would not dare tell all. The confidence between the guilty and his legal coadjutor would be restricted or destroyed. Is it the interest of the public that it should exist? The criminal, knowing that his disclosures may be divulged, will withhold them. He may thus lessen his chance of escape—he may thus be crippled in his attempts at eluding justice. Is that a source of fear or regret? Were the attorney examinable, the relation either would not exist, or it would exist within the bounds of integrity and of an enlightened public policy.

If the testimony of the party is to be received, the reception as witnesses of those connected with him, however close the connection, would seem necessarily and inevitably to follow; for however strong the tie, whether domestic or professional, its pressure would never be so great in intensity upon others as would be that of the personal interest of the party upon himself; nor could he be so injuriously affected by the disclosure of communications made to others as by what he might be compelled to disclose; that is, the derivative interest of the attorney or the wife in the affairs of the client or the husband, would never equal the original interest of such client or husband in his own;—and the danger to such client or husband from the disclosure of communicated information will not equal that from the examination and cross-examination of the party confidentially making the communications disclosed—as he may be compelled to state alike what has been withheld as well as what has been disclosed. Hence, when once the primary interest ceases to be a ground for exclusion, much more should all associated or derivative interest be received. If fear of falsehood, dread of perjury, hardship in uttering self-disserving testimony, do not suffice to exclude the party as a witness, certainly no reasons can justify the exclusion of any facts he may have communicated, no matter to whom nor under what circumstances the communications may have been made.

The design of the law is said to be "to encourage confidence and preserve it inviolate." That under certain limitations, confidence should be encouraged and preserved inviolate, may be and undoubtedly is true. But the compulsory giving of testimony in accordance with the requirements of the law, can, in no just sense, be considered a violation of confidence. In certain relations, with or without legal encouragement, confidence will naturally arise. The very fact of the existence of the relation of husband and wife, attorney and client, confessor and penitent, and physician and patient, necessarily implies antecedent confidence. Without it, the marriage contract is never made, the attorney is without a client, spiritual consolation is unsought, and the aid of the physician is never required. Precedent confidence is implied in the inception of those relations, and their duration rests upon its continuance.

The preservation of confidence may be right; that will depend on the confidence to be encouraged, and being encouraged, to be preserved inviolate. The confidence should be that between those in the right—between those seeking no wrong and violating no right;—a confidence compatible with the great ends of justice,—none other. It may be wrong. The confidence between associates in fraud, between accomplices in crime, is not of such a nature that the interference of the law in its favor is either necessary or desirable, for any of the objects of good government. The knave or the criminal reposes confidence, no matter in whom. What claim has the confidence of guilt or fraud to legal inviolability? Is not the protection of this sort of confidence the encouragement of crime, the support and aid of fraud? In the right, all confidential communications being true, will, if communicated, subserve the right; that is, they will be in accordance with and favorable to the great ends of justice. The exclusion of confidential communications does not rest upon any doubt as to their truth; it assumes, their truth, and for that cause excludes. It is the wrong-doer, civil or criminal, alone, whose interests will be jeoparded by the disclosure of such confidential relations as he may see fit to make; and it is difficult to perceive what claims he has to the protection of his interests over those of the party in the right.

The exclusions are for the benefit of the wrong-doer, and for his benefit alone. In the right, all confidential communications necessarily establishing, as they must, the truth, for a confidential communication of falsehood by the party in the right is not supposable, the party so communicating them could have no objection to their introduction. No matter how confidential the communications, their judicial promulgation would never be to him a source of regret. It is only when the facts communicated being true, are self-disserving, injurious to the communicant, he being in the wrong, that he would grieve at the disclosure of such communications.

Judge-made law, overruling the statute of the legislature, veils from the public eye all communications for whatever purpose made. The attorney may advise how the law may be evaded—if evaded, how the criminal may escape; and such consultations, which if made with others would be criminal, made with him, are protected. The confidence of the accomplice is less dangerous to society and more deserving its protection. He is the child of circumstances—the creature of revenge or passion. The attorney is the skilled, sagacious, cool-blooded, and ever-prompt accomplice. The legal Dugald Dalghetty, like his unscrupulous namesake, is ready, for the forty pieces of silver, to hire out his services for any purpose or object; but, unlike his prototype of arms, he plies his occupation, unquestioned and in safety, behind the impregnable rampart of legal irresponsibility and professional secrecy.

The rule contended against is bad, in every aspect in which it can be viewed; useless to honest and useful to the dishonest clients, and for that reason to be withheld; adverse to the best interests of the public, by fostering a spirit of unscrupulous and reckless litigation—encouraging the commission and facilitating the escape of crime—dishonorable to the bar as making them the recipients of dishonest secrets—diminishing the

confidence of the public in their integrity, concealing from public scrutiny all intercourse between client and attorney, and shielding the attorney from that public reprobation, which would justly follow the avowed accomplice.

This rule of privilege, though resting "on very obvious principles of convenience and policy,"(x) yet, "being a great anomaly and in contravention to the general rules of law,"(y) and "having a tendency to prevent the full disclosure of truth,(z) ought to be construed strictly."(a) The policy of anomalous rules, of rules in contravention with each other, being established, the next labor of the judge is to limit and restrain the operations of his politic rules, so that they may be as little injurious as possible. The consequence is, that exception after exception is carved out, till it becomes a matter of doubt, whether the rule or the exceptions shall prevail.

The attorney, besides being an attorney, may be a friend, and the question then occurs, in which capacity the communications were made.(b) The attorney has separate, distinct, and divisible existences. Like the bi-faced god of the Romans, or that miraculous incarnation of contending powers, the judge-chancellor, according as the witness is addressed, he is heard or excluded. The words spoken in his *dexter* ear, he hears as a friend and is a competent witness; in his *sinister*, as an attorney, and his testimony is refused. A loop-hole for evasion is now found. A metaphysical separation of the attorney is made, but made at the peril of the client. The separation is purely ideal, and the attempt to determine the character of the communications would be as absurd, as the attempt to resolve the individual into separate and distinct persons.

But who is to determine, whether these communications are made to him as a friend or as an attorney? The client alone knows. The rule is made for his benefit, and he, it should seem, ought to determine; but such is not the law, "the court judge from the particulars of the conversation;"(c) and according as they judge, he is received or admitted.(d) Before they can judge they must first hear; so that the communication must be disclosed, to ascertain whether it be admissible or not; the confidence must be violated, and the question of the correctness of that violation settled afterwards. If, from "the particulars of the conversation," as disclosed by the attorney, the court should be satisfied that it was a professional communication—then has that most sacred confidence been betrayed by their order. How is the evil to be repaired? Is not the course pursued "doing evil that good may come?"

(x) 1 Stark. Ev. 103. (y) 3 C. & P. 518.

(z) In Balguy v. Broadhurst, 1 Sim. (N. S.) 112, Lord Cranworth, V. C., says, "Judges have differed in their opinions as to the general policy of the rule as to privileged communications. Some of them have thought that there should be no such rule. Others have been of a contrary opinion, and have said that truth may be purchased too dearly. The rule however is now established and acted upon, and whatever may be thought of it, I am sure that it is most inconvenient to have a rule laid down and *the courts struggling to avoid it.*"

(a) 12 Pick. 98, Hale v. Foster; 14 Pick. 422, Hathorn v. Robinson.

(b) 2 Stark. Ev. 396. (c) Annesley v. Earl of Anglesea, 8 St. Tr. 142, 380.

(d) An attorney cannot be asked whether A. asked his advice for a *lawful* or an *unlawful* purpose. Shellard v. Harris, 5 C. & P. 592.

The attorney being thus *twofold* in his nature, so that the *friendly* portion of him may be received, one would hardly suppose, that when the relation never existed, when the attorney refused to act as such, that the exclusion would then take place. An attorney is consulted as to the commission of some fraud; he is a man of integrity and declines becoming a participator; the disappointed client seeks some more congenial counsel; the fraud is perpetrated, the individual who acts, and, who refuses to act, are alike considered as attorneys and excluded. The defrauded party calls on the minister of justice in the temple of justice; though sworn if he know of any falsehood, &c, to give knowledge thereof to the court, his testimony is unheard. Whether the consultation be for a *lawful* or an *unlawful* purpose,(*e*) the law regards it with an equal eye. The minister of the law is the only individual, who is compelled to keep secret from the court and public all falsehoods, or all intention of committing any, with the most scrupulous fidelity.

Cautious as the client must be, as to the ear which he addresses, that it be the *one*, or that portion of each appropriated and set apart for litigants, he must be still more on his guard, lest his rights suffer from the too keen vision of his attorney, "the effect of his eyes not being a communication of his client;"(*f*)—and of course what is *seen*, being unprivileged—what is heard—that portion of it which is not communicated as a friend—being privileged.

So too the attorney may be admitted to prove a receipt of a particular paper from the client, *because that is a fact.*(*g*) The existence of the paper, and that it is in the hands of the client, may be the very *facts* to be tried, or if not the facts directly in issue, they may still be of great importance, in their bearing on certain portions of the cause. It is evident that the fact is important, else it would not be inquired into. Being important, does not the same rule of professional secrecy, which withholds all oral or written communications, equally require that this should be withheld? If a part of that intercourse is to be protected, why should not all? Why allow the veil to be partially withdrawn, when a partial withdrawal may be as injurious as a total? *Because it is a fact*, is that any reason? Is not the utterance of certain communications, the disclosing of secrets, a *fact*, and a fact of precisely the same nature as entrusting deed or other papers?

But it would seem, that while it may be shown, that the papers are in the hands of the attorney and delivered by the client, the law does not

(*e*) See 2 B. & B. 4; 4 Moor. 357, Cromak v. Heathcote.

(*f*) The following question was put to an attorney. Did you ever see a certain paper bearing date, &c., between, &c.? If yea, when and in whose hands?

The Court. "This is an interrogatory he must answer. The effect of his own eyes is not a communication of counsel." O'Gorman v. M'Namara, Hayes's Irish Exchq. Rep. 174. In Brown v. Foster, 1 Hurls. & Nor. 736, Martin, B., says, that, "with respect to matters which the counsel sees with *his own eyes*, he cannot refuse to answer."

(*g*) Euke v. Nokes, M. & M. 304. But he cannot be permitted to state whether it was then in the same state as when produced on trial—as whether stamped or not. Wheatley v. Williams, 1 M. & W. 533. Or altered since, Brown v. Payson, 6 N. H. 443. But he must state whether it is in his possession or elsewhere in court. Dwyer v. Collins, 12 E. L. & Eq. 533.

admit him to produce them or to disclose their contents.(*h*) The contents known, that *he* has them, is the all-important *fact*. If the client, without producing papers, discloses their existence, it is a privileged communication, and however important it may be, it can never be known.

If, with the same objects and for the same purposes, instead of *stating that fact*, that he has the papers, he produces them for the inspection of his client, all professional confidence ceases.

Uncertain as it is seen to be, *when* the privilege exists, and *what*, if it exists, is privileged, equally uncertain is the duration of its existence. "If the client chooses, after this relation has ceased, to volunteer any communications, he is not protected, though they be *in substance the same as they were given while that relation subsisted. The reason of the rule ceases.*(*i*) But does it cease? Is "*the reiteration of what had been communicated, whilst the relation of client and attorney subsisted,*"(*i*) a new communication? Is it a communication? Does it give any new information to the attorney? The communications of the client first made are to be kept inviolate through all coming time. None others are made. Which does the attorney disclose, the original communication, or its subsequent reiteration? If the former, it was privileged, if the latter, being the same in substance, is not his confidence *as much betrayed* by its utterance, as it would have been, had there been no repetition? The subtle metaphysician, who decides according to the sense addressed, or who resolves the individual into testifying and *non*-testifying parts, sees no difficulty here. The principle is obvious; the repetition of what is confidential absolves from all confidence, and unseals the lips of the attorney.

No especial and protected legal confidence is required in the ordinary business relations of life. The relations of partners, of principal and agent, of banker and clerk, of trustee and *cestui que trust*, of physician and patient, are of the most confidential nature,—may require the highest degree of mutual trusts, may involve the greatest pecuniary and personal interests; yet when needed for the purposes of judicial inquiry, communications ever so confidential should be disclosed. The secrets of friendship, the confidential relations of the parent to the child, of the brother to the sister, are not permitted to be withheld. Now the relation of attorney and client is purely a business relation, having neither the sacredness nor the mutual confidence of friendship nor of kindred, involving, to be sure, great pecuniary interests in reference to which the attorney is to act as an agent for his principal. In all other cases, communications, however confidential, are compulsorily required by the law, when deemed necessary or important for the preservation or protection of the legal rights of parties litigant, and they should be equally so in this.

The rule of law by which the confidential communications of the

(*h*) Jackson v. M'Vey, 18 John. 330. The attorney would seem to be a safer depository of papers than the client himself, as the client, by bill in equity, might be compelled to disclose their contents, the attorney never. Lynde v. Judd, 3 Day, 499.

(*i*) Yordan v. Hess, 13 John. 494.

client to his attorney are clothed with inviolable and compulsory secresy, is dishonorable and degrading to the legal profession—injurious to the public, and entirely unnecessary to the client for any proper and legitimate purpose. Were the rule abolished, the relation between the client and the attorney, wherever it existed, would be confined within the bounds of integrity and enlightened public policy, as it should be.

But it would be an useless labor to examine all the cases of exceptions from the rule. We have now examined the different rules for exclusion known to the common law, and the reasons on which they are based, and by that examination have satisfied our readers, as we trust, of their impolicy. Numerous and important as are the exclusions of the common law, they are small compared with those of other nations. No unimportant argument against exclusion arises from the fact, that while all codes exclude, there are no two codes, which agree in the cases proper for exclusion, the incompetent in one being competent in the other, and the reverse; while if *all* the exclusions of the different codes were adopted, it would amount to a total denial of justice, from the utter impossibility of obtaining proof.(*k*)

(*k*) The *comparative jurisprudence* of different nations, or of the same nation, at different periods of its existence, is a subject well worthy the attention of the philosophical investigator. A slight sketch of the exclusive rules of different codes, will give the reader some notion of what would be the situation of a party, were they all adopted by any one code. By the Mahommedan code, "in all matters of property or the common transactions of life, two men, or one man and *two* women can prove a fact. In all criminal cases, except adultery, (which requires *four* witnesses,) the testimony of two men is sufficient. The moral character of the witnesses is to be regarded. Thus the testimony of *drunkards*, *gamesters* and usurers is inadmissible. Evidence *in favor*, whether of a son or grandson of a father or grandfather, cannot be received . . . Slaves cannot be witnesses, nor can a master testify for his slave. *Infidels* and *apostates* cannot be witnesses in a cause, when a Mussulman is a party, though in some cases, not involving the punishment of death, the evidence of infidels is admissible. When received, the Jew must be sworn by the Pentateuch, the Christian by his Gospel. See Mills' Hist. of Mahommedanism, ch. 5, p. 359.

The testimony of women is not admitted to prove a charge of wilful homicide, on the ground of a tradition, that in the time of the prophet and his two immediate successors, it was an invariable rule to exclude the evidence of women in cases of the greatest magnitude. In cases of homicide not wilful, the evidence of one man and two women, is considered equivalent to that of two men. If the person accused be a Mussulman, the witnesses must be of the same religion. The testimony of Zimmees or infidel subjects is admissible as respects each other.

By the laws of Menu, "Those must not be admitted as witnesses who have a *pecuniary* interest, nor *familiar friends*, nor menial servants, nor enemies, nor men *perjured*, nor men grievous by disease, nor those who have committed heinous offences. The king cannot be a witness, nor cooks, nor the like mean artificers, nor public dancers and singers, nor men of deep *learning in scripture*, nor a student in theology, nor an anchorite, nor one dependent, nor one of bad fame, nor one who follows a cruel occupation, nor one who acts against law, nor a decrepit old man, nor a child, nor *one man* unless he be distinguished for virtue, nor a wretch of the lowest mixed class, nor one who has lost the organs of sense, nor one grieved, nor one intoxicated, nor a mad man, nor one tormented with hunger or thirst, or oppressed with fatigue, excited by lust, inflamed with wrath, nor one convicted of theft." Laws of Menu, 197.

"A slave of either sex, a blind man, a woman, a minor till of the age of fifteen years, an old man of eighty years, a leper, one guilty of murder, theft, adultery, of false abuse, a man who, enticing another by treachery, kills him, or who is employed in *games of dice and chance*, a wrangler, a juggler—such persons are not

witnesses in affairs of murder, theft, adultery, and false abuse. In those four cases only, one man of veracity, and good disposition, and love of truth, can alone be examined as a witness. Translation of Gentoo Laws, 126.

One single person, a woman, a man of bad principle, a father, or an enemy, may not be witnesses: but if the father and enemy are men of good disposition, and men are acquainted with their veracity and the goodness of their disposition, they may be received. *Ib.* 124.

The Jews excluded all women, "*on account of the levity and boldness of the sex.*" 3 Horne's Intro. 112.

In all our Southern States, slaves are excluded, in some, all Indians, and even the *free* negro is excluded, when the rights of the white man are involved. See Laws of Georgia, and 1 M'Cord, 43.

The exclusions of the Roman Law are almost as numerous and important as those of the Gentoo Code, and are or were substantially adopted as the basis of the law of all Continental Europe. They seem to proceed on the principle, that the slightest inducement to falsehood is stronger than every motive to truth.

Ob ætatem non admittendos infantes et infantiæ proximos. Pubertati proximos quidem non prohiberi dicere testimonium, si de rebus testentur, quas intelligunt; non tamen cogendos esse invitos, nec semper omni exceptione majores haberi. Minores admitti in causis pecuniariis; in criminalibus, non aliter quam si sint majores viginti annis.

Ex eodem consequi videbatur, non magis quam infantes testes esse posse furiosos, et mente captos. Nec *servorum* testimonio credendum esse, nisi ubi alia desit ratio eruendi veritatem, et testimonium in eculeo, vel sub tormentis, dicant, modo non adversus dominum, vel pro eo interrogati.

Denique ex eodem sibi recte colligere videbantur, vacillare fidem judicio publico damnatorum, criminis accusatorum, vel in *vincula publica conjectorum*, calumniæ in publicis judiciis damnatorum, senatu motorum, *paganorum*, *apostatarum*, *hæreticorum*, damnatorum ob carmen famosum, vel ob corruptionem, acceptamve pecuniam, ut testimonium vel dicerent, vel non dicerent, mulierum, quæ quæstum corpore fecerunt, eorum, qui vitam ad cultrum, depugnandasve bestias locarunt, omnium denique *viliorum* et *pauperum*, quamdiu aliorum est copia.

Nemo admittendus sit in causa vel propria vel socii. Ut merito repellantur pater in causa filii, filius in causa patris, aliique potestati vel imperio alterius subjecti, vel *domestici*. Ut et patroni, tutores, curatores in causa clientis, pupilli, minorisve sui testimonium dicere non possint. Ut suspecti sint *amici* vel *inimici*, nec non qui jam antea in eum reum dixerunt testimonium.

Parcendum tamen sanguini et affinitati, nec cogendum aliquem testimonium dicere adversus socerum, generum, vitricum, privignum, sobrinum, sobrinam, sobrino natum, eosve, qui priore gradu sunt, nec libertos cogendos adversus patronos, vel hos adversus libertos testimonium dicere. Heinn. Elem. Jur. Civ. Sec. Ord. Pand. § 138-141.

CHAPTER XI.

HEARSAY EVIDENCE AND CONFESSIONS OR ADMISSIONS OF THE PARTY.

HEARSAY evidence is that which comes through the lips of a deposing witness, who swears that he has heard the facts to which he deposes, from some other individual, either the original percipient witness, or some one to whom such witness has related them. He vouches only for the accuracy of his narration, not for the truth of the facts narrated. The assumed statements of the supposed original percipient witness, (supposed we say, for there may not have been such witness) constitute the real evidence upon which the judgment of the court is based. The credit is given not to the deposing, but to the percipient witness, whose statements, when they constitute the grounds of the decision, are received not only as true, but as truly reported, although they are obtained without any of the ordinary securities for testimonial trustworthiness. An unseen, unheard, unsworn, unquestioned witness, guides the mind and controls the judgment of the court. This testimony, from the necessity of the case, is manifestly inferior to that of the original witness, delivered under the usual securities for truth.

The reported confessions or admissions of the party to a suit or process, are none the less *hearsay*, because they are the statements of such party. They are liable to the same deductions, they are infected with the same inherent defects, which are considered as weakening to a very great degree the probative force of any other instance of hearsay. Hearsay as against another—it is none the less hearsay as against the party. The common law recognizing it as the "first and most signal rule of evidence, that the best evidence of which the case is capable shall be given,"(*a*) the inquiry naturally arises, why secondary evidence, delivered without any of the essential tests and guaranties for truth, should be thus preferred to primary, delivered under and with every security known to the law; and why the *hearsay* confessions of the party are received against his interest, while the party who is supposed to have made such confessions, is excluded.

The reason assigned for this apparent anomaly is, that the confession of the party is the best evidence,(*b*) which can be given; and though

(*a*) Roscoe on Evidence, 1.

(*b*) The confession of the party is the best evidence, Norris's Peake, 36 n.; Hendrickson v. Miller, 1 Rep. Cons. Ct. (S. C.) 296; and 2 Rep. Cons. Ct. (S. C.) 215. It is the weakest and most unsatisfactory testimony, 1 Wend. 625-652; Proof of confessions are to be received with great caution, Morehead v. Thompson, 1 Lou. 286. The cases are about even. The oracle uttereth an uncertain sound. Its votaries receive with equal awe, the dubious and contradictory responses, from which the judicial soothsayer selects, as the pressure of the case may require; each being, for the time, the perfection of human wisdom.

the hardship of compelling the party to state facts against his own interest is a sufficient reason for excusing him, that hardship it is considered would vanish the moment similar statements of his are disclosed to the court through the lips of another. The real value of this testimony is to be considered.

In all cases of hearsay, the effective witness is the individual, whether party or not, whose supposed statements the narrating witness relates. The individual testifying is merely the conduit or pipe, through whose agency the impressions of some one else are conveyed to the court. The real proof is the hearsay statement, and the credit which the testimony should receive, depends on such extraneous witness. In case of confessions, it is the party who testifies in his own cause against himself, without oath or examination by or before any competent judicial authority, and without the power of altering or explaining his testimony—thus affording another exception to the supposed inviolability of that rule of law, by which the party stands excluded.

Confessions are either judicial or extra-judicial—voluntary or involuntary—intentional or unintentional.(*c*)

Voluntary, intentional, judicial confession is when the party accused, without external influence or coercion, after being fully examined by the judicial authority, confesses his guilt with a knowledge of the use subsequently to be made of it, and of the adverse results which will ensue from his statements. Being uttered as and for confessions, they will be correct and complete, and if not correct and complete, judicial interrogation will supply all deficiencies; being heard by the judge, no error from misapprehension or misrecollection need exist, or if existing, it may be corrected on the spot. The intervention of a testifying go-between ceasing, they cease to be hearsay. Judicial confession, as known in the civil, is unknown in the common law.(*d*) Notwithstanding the great precautions which the civil law adopts to prevent false or erroneous confession, still the whole history of judicial trials is replete with instances of the utter uncertainty of this species of testimony. Confessions, self-criminative, of unreal, impossible crimes, at impossible times and places, have been again and again made, and the supposed guilty, because confessing, have been executed. The motives of such a course have been as various as the individual pursuing it. Melancholy, ennui, the wish to save a friend or relative—or to divert the attention of the judge from a real and greater to an unreal or less crime, a desire to please the officer of justice, the hope to lessen punishment—to obtain a removal

(*c*) Voluntary and intentional, and their opposites. The confession may be voluntary, there may be a perfect freedom from coercion, and yet no intention or expectation that what is said shall ever be used as an article of confessional evidence,—as casual street conversation, uttered with no design that they shall ever be used as confession, yet perfectly voluntary. So the confessions may be intentional, designed to be confessions, yet not voluntary. As confessions uttered upon compulsion, they are uttered as and for confessions, they are intentional, yet they may be obtained by force, and so far not voluntary.

(*d*) The examinations of prisoners by and before magistrates are by virtue of certain statute provisions in England. The only instance of judicial confession in the common law, is the case of the prisoner's pleading guilty upon his arraignment, upon which, as a matter of course, sentence is passed.

from one prison to another, are and are proved to have been motives sufficiently powerful to induce false confessions.(e)

Confessions, as they are ordinarily obtained in common law courts, are never in civil and but very rarely in criminal cases, made on the part of the individual whose confessions they purport to be, with the intention or expectation that they will ever be used as evidence. Were they so intended, were they meant to be what the relating witness reports them to be—in civil cases an admission of the rights of the adverse party and in criminal an acknowledgement of the guilt of the accused—it would rarely happen after such an open abandonment of one's cause, that the individual so abandoning would be induced to sustain a defence, the non-existence of which he had admitted. They are ordinarily made accidentally and not with any intention of their ever being subsequently used in a court of justice. The confessions thus obtained, though unpremeditated and so far trustworthy, being mere casual remarks, may be incomplete to any supposable extent; or, sufficiently complete for the purpose of their utterance, they may be utterly incomplete in relation to all the facts, of which they may constitute but an insignificant portion.

The confession extra-judicial,—involuntary,—unintentional,—its subsequent judicial use and importance unimagined, its connection real or imaginary with other facts unanticipated, it can hardly happen otherwise, than that the statements thus made should be deficient in clearness, correctness and completeness. Indistinct, incorrect, or incomplete—to the extent of such deficiency, error, and its unavoidable result, misdecision,—to the injury of the party making such statements, must ensue. All casually made confessions will ordinarily partake in a greater or less degree of these defects. In case of a conversation accidentally overheard, or entered into, in relation to any given subject matter, it not being foreseen for what purpose it may at some future time be used, the party speaking is not full and complete in his statements; or being so in relation to the subject matter of the then present conversation, he may be incomplete in reference to the collateral bearing of his remarks upon something else, to which as a matter of confessorial evidence, they may be transferred. Made as the statements may be in relation to different objects and for different purposes, they may be true and the whole truth as far as the matter then under consideration is concerned—and yet not

(e) The civil law adopts the greatest precautions to secure the rights of the prisoner confessing.

To constitute a perfect confession it must appear:

1. That the crime has been committed.

2. That the confession has been taken before a proper judge. Extra-judicial confession, though it may raise a presumption, yet does not constitute full proof.

3. That it be simple, clear, in plain terms, and voluntary.

4. That the information, obtained *aliunde* by the judge, agree with the confession.

5. That the special circumstances, stated by the party in his confession, be found on subsequent examination to be correct.

6. That the confession contain such circumstances, as the party, in case he were innocent, could by no possibility have known.—Vanderlinden's Ins. 362.

A confession made before two competent witnesses in the absence of the judge is only *half* proof, and requires to be confirmed by other evidence.

the whole truth as viewed in their subsequent, distorted connection with other matters. The conversation too may be in relation to the cause in which they are used, and being partial, incomplete, or defective, the omissions of true facts, the result of negligence or any other assignable cause, may be as dangerous to the cause of truth as the most perverse and deliberate mendacity.

To elicit the whole truth, requires skill, power, and adequate motive. Effective, successful interrogation is the work of labor, and will never be undertaken except when some duty requires it. The casual auditor, who afterwards becomes the narrating witness, without motive to put the necessary questions or power to compel an answer, is content to receive what may be offered. He never seeks to ascertain the whole. What is the whole or a part to him? Why should the accidental auditor of a narration, to him unimportant, assume the labors and duties of counsel or judge and cross-examine the individual with whom he is conversing?

But if there be interrogation, who will guarantee propriety of manner, integrity of purpose, and the requisite knowledge? The interrogator is whosoever he may be. His qualifications are as accidental as his person or his presence. His purpose is known only to himself—unknown it may be to the person interrogated. His object may be sinister—his questions captious(*f*) or ensnaring.(*g*) How this process may be conducted, can only be known from the lips of one, who, if dishonest, will be little likely to condemn himself. Not made judicially, the judicial power—that of examination—is abandoned to chance. The chance-examiner willing to undergo the labors of examination, how will he know that a crime, and if any, what, has been committed, when, where, and in what manner,—and thus unexpectedly assuming new duties, how will he be able to follow fraud or crime through all its circuitous meanderings? If, without the requisite information, and when will he obtain it, he attempts, he stumbles at the very threshold of his investigations. Attempting it, the power to enforce an answer is wanting. Accidental disclosures only are obtained. The will of the party bounds the limits of the information received.

(*f*) The German law, while permitting the necessary examinations of the prisoner, lays it down, that no questions either captious, (thereby meaning such as may involve the party in admissions, without his perceiving their tendency,) or suggestive in their nature, are to be put to the prisoner, nay, the name of an accomplice or of any special circumstance connected with the fact but not yet proved, shall not be suggested to him, otherwise the confession so taken shall be of no effect. Foreign Quarterly Review, vol. viii. p. 298.

The examinations of the prisoner, however, are repeated so frequently, so long a time elapses between the commencement and termination of the process, as to appear almost incredible to one conversant only with common law process. The trial of Riembaur, a German priest, accused of a murder of almost unprecedented atrocity, was continued through a period of over four years, during which he underwent one hundred personal examinations, at each of which he protested his innocence, till on the hundredth, moved by the serenity which another criminal who had confessed displayed on his execution, he confessed his guilt. The records of the proceedings in the case filled forty-two folio volumes. Ib.

(*g*) "Who," asks Morton, J., in Faunce v. Gray, 21 Pick. 243, "ever heard the confessions of a party objected to, as inadmissible, because his adversary artfully and designedly drew him into conversation on the subject of a controversy, for the purpose of using the declarations he might make, as evidence against him?"

The conversation at the time unimportant, but by subsequent events acquiring an unexpected importance—what motive has the narrating witness to note the precise words used. Of the ordinary street conversation, who ever attends with sufficient care to hear accurately the whole—or, hearing, makes the effort to remember. Without inducement, which, by the hypothesis there is not, what probability is there, that there will be the requisite care to understand, or if understood, that it shall be recollected, or if recollected, that it shall be accurately repeated. Language,(*h*) though the best, is but an inadequate and imperfect means of conveying thought. Of any given conversation heard by different witnesses, the reported accounts vary. Yet if the exact language be not used, misconception arises. The purport, substance, tenor, or effect, as understood and recollected by one witness, will be different from it as understood by another, and neither convey the real meaning of the party. Where the intention is to remember the identical words used, as in the act of committing to memory, there are few instances, where the object is accomplished by one perusal or one hearing of the words to be remembered. It is a process of labor, where remembrance is the design in view; but in all cases of casual conversations, there is no such design. The pretended recollection is rather the result of a process of reasoning or imagination than of distinct remembrance.

Had the supposed conversations been uttered for the very purpose of being reported as testimony, and heard by the witness with the intention of so reporting, the chance of exact and verbal repetition may be understood, by hearing any given sentence read, or hearing any conversation, and then attempting after a lapse of time to repeat the same as a set and appointed task. Even with the aid of memoranda made at the time, as in the case of notes taken by the court or by counsel, in the trial of a cause, complete accuracy is rarely attainable, it being found, that the notes of each somewhat vary from those of the other, and probably both from the exact words used. Where then with every effort to be accurate—disagreement—error creeps in—what reliance can be reasonably placed on the half-smothered recollections of days or years, coming through the lips of some uninterested witness, who reports himself as having been at some time past the accidental auditor of certain casual and to him unimportant conversations.

Much depends upon the state of mind of the narrating witness, whether you refer to the time of the supposed conversation, or of the delivery of his testimony. In the case as yet considered, the state of mind was that of indifference. But the witness may have gone, to procure confessions, to garner up what he could, for judicial use. That fact unknown to the party, whose confessions are thus obtained, the information elicited is only on such points and to such extent, as the extrajudicial examiner thinks best adapted to accomplish his sinister purpose. The object in view is not the whole truth but the reverse; the object unsuspected by

(*h*) "The lower orders of men," says Best, J., in Rex v. Sexton, 6 Petersd. Abr. 87, "have but few words to convey their meaning; and they know as little of expressions that they are not in the habit of using, as if they belonged to another language."

the party-witness, he answers only to the inquiries; and thus answering, much if not all, which might go to exculpate, is withheld. The witness adverse to the party, he hears with no friendly ear. The explanations and qualifications, if heard, are heard only with inattention, to be forgotten. The questions are one-sided, captious; one-sided results are sought after; and the means to obtain them pursued, and the end accomplished.

The extra-judicial confession may be voluntary and intentional, that is, there is the intention that it shall be a confession. If so, if made extra-judicially with the intention to confess, what objection is there to a repetition by the party in open court, subject to judicial interrogation? If willing to confess extra-judicially, if the supposed extra-judicial confession was in truth as it is reported, the party would be little likely to deny such confession. The judge would certainly rely with more security on the testimony heard by himself, than on the reported conversations, related by whomsoever they may be.

So too the casually written documents of the parties in civil or criminal cases may be offered as the confessions of the individuals whose writing they purport to be. The degree of credence, to which they may be entitled, depends on the time, circumstance, and occasion of there being so written. Written for other purposes, they are obviously wrested from their intentional and legitimate use. Were they written for the very purpose of giving an account of the subject-matter of discussion, they would be ordinarily incomplete. The process of interrogation would be required, to develope more fully much that is dark and uncertain. Explanations, additions to, subtractions from, or modifications of, the literal words used, would be required. In the case of the witness testifying under oath, with the intention to relate the whole truth, it rarely happens that the examination in chief is not essentially modified, restricted or limited, by the subsequent cross-examination. Here there is neither the original nor the cross-examination. When the papers, letters, whatsoever they may be, are written for other purposes, but are subsequently diverted from such original purpose, neither correctness, clearness, nor completeness, can be expected. It is at best mere written hearsay.

Even where the intention to narrate every important fact may be supposed to exist, that importance will be relative to the mind of the individual so narrating, and the use which he expects will be made of those facts. His impression of the material or the immaterial may vary from that of another—it may be erroneous. If so, an imperfect development of facts inevitably follows. The importance of a fact is relative to the use to be made of that fact; the use unforeseen, the means of ascertaining such importance are withheld; and the best intentions to relate what would be thus important, would be of no avail.

Extra-judicial testimony reported to the court through the lips of whomsoever it may be, and with accuracy howsoever great, is thus seen to be the mere fragment of testimony, a fragment larger or smaller as it may chance to be, but still a fragment. Received as it is, correction or explanation may be required. The confession may have been made

under an error of fact on the part of the individual confessing;(*i*) there may be misconception, misrecollection, misrelation on the part of the witness. Erroneous from any or all these causes combined, is the party, whose supposed but not real confessions have been heard, to be admitted to correct or explain?

By the rules of the common law, a confession or admission, however erroneously made or incorrectly reported, is irrevocable, unalterable, unexplainable. Its supposed original import, as related by the narrating witness, can never be varied or contradicted by the conflicting testimony of the party. True of casual extra-judicial confession at common law, it is not true of advised judicial confession. The accused, who pleads guilty, advised by counsel and cautioned by the court, acts understandingly, with a full knowledge of the consequences of such a plea. Cautious, vigilant that life or character may be protected, blending mercy with vigilance, the judge watches over the rights of the prisoner. The plea of guilty is a deliberate, conscious, advised act. The reported extra-judicial confessions are made to whomsoever may happen to be present, made when there is no one to advise or caution, made unconsciously, not intended to be confessions, erroneous, mistaken, falsely reported, yet they are received. The judicial one-worded confession, the answer of guilty, may be changed for its reverse by permission of the court, the confession the least dangerous because deliberately made by him, may be recalled, the confession, the import of which can neither be misunderstood nor misrecollected by the judge, may be revoked. The confessional fragment must remain for ever imperfect.(*k*) The common law, stern in the barbaric majesty of cumbrous forms and antiquated precedents, hears neither correction, nor receives explanation. The huge car of judicial precedents is driven on, careless of results, crushing all who may be in its path.

All other falsehoods may be detected and refuted. Here detection and refutation are denied by the law itself. Excluding all attempts to explain the original or the supposed original tenor of the confession, though the innocent party is unjustly condemned, unless, which is impossible, in every casual conversation with all men, at all times, in every letter or written document which he may chance to write, no matter when, where, or on what occasion, he state every explanatory or exculpatory fact, which may have either a direct or collateral bearing on the subject-matter of his discourse; unless, in fine, gifted with omniscience, he should be able to foresee all possible contingent uses, which in all coming time should be made of his testimony; and thus foreseeing,

(*i*) Confessions must be made voluntarily by a competent person, and if made through error, may be revoked before the suit is terminated. Institutes of Spain, 328.

(*k*) What is said at one time as explanatory of a previous conversation, is not admitted, because, says Mr. Justice Washington, "What a party has said at one time, which makes against him, cannot be explained by declarations made at another time, which possibly were made to get rid of the effect of former declarations." 1 Peters' Circuit Court Rep. 16; 5 Conn. 224. If the admissions first made were erroneous, why should not the party get rid of them? How can that be done but by explanation? Why not permit the jury to determine on the original confessions with the explanation?

should so adapt it that it shall be clear, complete, and correct, in relation to every possible use thus to be made of it. Thus much he must do, for there is no remark, which may not, as an article of confessional evidence, be used adversely to elucidate directly or indirectly some transaction, in which the party making it may have an interest. The selection of such statements or admissions for use is made by the individual, whose interests they will subserve, and at the risk of the individual confessing or supposed to confess.

In all other instances of hearsay, the primary proof, which by the hypothesis once existed, is unattainable; and for that cause alone, is the secondary, inferior evidence received. Here the presence of the party or the means of enforcing his presence excludes that as the reason of admission. Hearsay, is it the more inexcusable when it ceases to be necessary? Does it become the best evidence, when a party is the supposed primary, and the worst, when some extraneous individual is the original witness? Hearsay testimony, unreliable from its recognized deficiencies in the mode of extraction, and in the securities for trustworthiness, is its intrinsic probative force increased by the mere accident of the supposed original percipient witness being a party to the cause? Of the same person, party or not, does the same reported evidence rise or fall in the judicial scale, as his relation to the cause varies?

The argument is not for the exclusion of confessional testimony (for that evidence would always be proper, were the party a witness,) as one mode of ascertaining truth and checking falsehood, but against its admission, if the party be not received. As the law now is, one can only litigate safely with sealed lips. The party nominally excluded but really admitted—excluded for all purposes of explanation, is received when most dangerous to his interest. The judge sees with another's eyes—hears with another's ears. His eyes have become dim, his ears deaf. To meet the witness face to face, he dares not; enough for him is it, to hear somebody who has or who will say he has heard him.

Hearsay, *by the very law of its existence*, is inferior to direct, secondary to primary, unoriginal to original evidence. If the party be excluded for any cause, either of supposed hardship to himself or of danger to the interests of justice, whatever be the reason assigned, it applies with increased force against receiving his confessions. Thus are the dangers of hearsay superadded to those of the testimony of the party. The exclusion of the party is the exclusion of his confession, or rather would be so were there aught of logical consistency in the law.

But the law, not happening to be logical, if either were to be admitted, selects the testimony most detrimental to the ends of justice. Having selected, the inquiry arises, what, if any, danger would arise, and to whom, from admitting the explanations of the party.

The danger of admission will be one affecting injuriously the great interests of the public or of the party.

The only fear on the part of the public is, that too much credit will be given to the explanation, and too little to the extra-judicial confession—a danger the very perception of which almost destroys the probability of its occurrence. But who will thus err? The judge of fact,

competent to decide when the evidence is surrounded with so many circumstances prejudicial to truth, when every security recognized by the law as valuable is wanting, is he any the less competent when these securities are applied by himself, to promote the trustworthiness of the testimony? The Athenians, fearing the effect of beauty on the judicial mind, required that females should be veiled when delivering their testimony. The sight of the party creating mental imbecility—might not the common law judge, following somewhat the analogous precedent of his Athenian brother, veiling his jury, admit the party?

Were the party received, would not the judge of fact, veiled or not, as should be deemed advisable, be more competent to decide, upon comparing the reported hearsay with the actual answers of the party upon his own interrogatories? The time, the occasion, the manner, the look of the eye, the readiness of response, the motion of the body, the intonations of the voice, are each and all circumstances of such importance, in weighing the credibility of testimony, that without these attendant circumstances, the words may be truly reported and the substance be wanting. Would not the chances of correct decision be more numerous, when the whole evidence should be before the court, than when part only is offered for consideration?

Would the party be injured by being received? The confessions, not made as confessions, diverted from their original purpose, made under an error of fact, erroneously reported, the selection of such as are required for judicial use, made not merely without consultation, but expressly of such as may be adverse to his interests, liberty of explanation is not allowed him. Without it error is inevitable. Does he claim the privilege, who is to deny him? Is he satisfied with the language reported—what stronger presumption of its truth? The guilty man attempts to explain. He dares not, fearing his attempts, undergoing as they must the scrutiny of cross-examination, will develope facts more injurious to his cause than have already appeared. The liberty to explain being allowed—if attempted or not, a new piece of circumstantial evidence of no mean force is obtained. Now, legal silence covers the whole field of confessions, and whether true or false, admitted or contested, they alike receive credence.

The common law, placing great reliance on the truth-compelling power of the religious sanction in other cases, voluntarily abandons it in this. Not merely abandons, but if the original confessions, of which the supposed import is related to the judge, had been obtained under the sanction of an oath,(*l*) they are for that cause excluded. The sanction, powerful in one case, is it totally powerless in another? Its efficiency, is it varying according to the relation the party sustains to the cause?

Were the testimony of the party delivered judiciously, subject to the process of interrogation with the legal securities of trustworthiness, he would be cautious; if misapprehension existed, it would be corrected. The several parts in all their bearings and relations would be before the court. Deficiencies would be supplied, doubts removed, explanations

(*l*) After all, there is no rule on the subject. It is just as it happens,—sometimes received, as in Rex v. Haworth, 4 C. & P. 254; sometimes rejected, as in Rex v. Smith, 1 Starkie's Rep. 242.

rendered. If the admissions or confessions were really as they are related, no reason exists why they should not be made on the stand, with all the securities which so pre-eminently distinguish testimony thus delivered, from loose and casual remarks, still more loosely reported. If the party state on oath as the narrating witness has already related, his testimony is obtained in the best form; if differently, if the party denies the reported admissions, it is for him to explain in detail the real facts of the case and the apparent discrepancy between his present and his supposed anterior statements, regarding the same subject matter. If satisfactorily explained, justice ensues, where before it was hopeless; if unsatisfactorily, then this inability constitutes a circumstance of great importance in arriving at correct decision.

Extra-judicial confessions in the English law, subject to so many infirmative circumstances as they are seen to be, and without the possibility of correction, are yet by the judge considered as sufficient proof upon which, in civil or criminal cases, to base a decision, which may be followed by the severest penalties of the law. The civil law, on the other hand, never grounds a decision on extra-judicial, nor in some instances even on judicial confessions; a fact which may well deserve the consideration of those interested in jurisprudential investigations.(*m*)

Parties to the cause, either plaintiffs or defendants, numerous.—Here, besides the dangers already considered, new and additional evils arise. The party, whose statements may be offered as evidence, though apparently, may not be really interested; or, being interested, there may exist an adverse interest of greater magnitude, so, that the apparent loss, which chiefly creates confidence in the confession, may be overbalanced by a greater gain elsewhere. It may happen in case of numerous contracting parties, that one ignorant of important facts known to the others, or of the real state of the negotiations, may make statements, which, being incorrect, though delivered with the most perfect integrity, may still be as injurious as the most intentional perjury. Those errors, the other parties if received might correct, but excluded, they remain at the mercy of all those, with whom they may happen to be or to have been associated by the plaintiff in his writ. The dangers of receiving this kind of testimony and of excluding those by whom, if erroneous, it might be controlled, increase in proportion to the number of parties and the complexity of the cause.

The common law presents a striking contrast to the rules of equity on this subject. In equity, when the defendant's premeditated answers are given on oath and with the aid and advice of counsel, the answer of one

(*m*) A confession duly made and satisfactorily proved, is sufficient alone to warrant a conviction without any corroborating evidence *aliunde*. Wheeling's case, 1 Leach, 311; Rex v. Eldridge, Russ. & Ry. 440, 481.

The law of Scotland does not authorize a conviction upon the evidence of an extra-judicial declaration alone, however explicit and however well attested as the free act of the accused, &c. Glassford on Evidence, 344, 345.

By the Bavarian law, confession is not sufficient to convict independent of other corroborative proof. 8 For. Quarterly Rev. 299.

The confession of a party, in order to have the effect of full proof, must be free, express, and taken before a judge. Extra-judicial confessions may raise a presumption, but they never constitute full proof. Vand. Ins. Dutch Law, 261.

co-defendant is not received against the other, because, "there is no issue between the parties and there has been no opportunity for cross-examination."(n) The confessions of a party are answers, differing only, that they are answers taken in the worst possible shape, and reported to the judge in the most dangerous mode; answers elicited without any security, without any regard or reference had to the rights of the individual answering, or of his associates, without even knowledge on his part that an answer is being obtained, and without the slightest efforts for accuracy, correctness or completeness. The reason good in equity, why permit at common law, when there is no "issue between the parties and no cross-examination," the unguarded, incomplete and casually uttered remarks of one plaintiff or defendant to be used to the prejudice of his associates? Why, in criminal cases, whenever life is at stake, allow a defendant, to be a witness against his associates, without oath or cross-examination, and against their consent? Where the party, whose supposed confessions are given, suffers alone, the principle that *consensus tollit errorem*, may, if he mean to confess, be considered as a justification such as it is, of the admission of the testimony. Here, others against their will and without the power of explanation or of cross-examination, may be bound by confessions either false or erroneous in themselves, or falsely and erroneously reported.

Exceptions.—The confession is heard—the explanation refused. Heard—but when and under what restrictions and limitations—and, if any, for what cause are they imposed? and how do they comport with the integrity of the general rule on the subject?

"Confessions made under some circumstances are not admissible. When they are *entirely voluntary*, they are to be received; but when they are drawn out by *any*(o) expectation of favor or by menaces, they are to be rejected. The reason on which confessions so drawn out are excluded, is *not because of any breach of faith in admitting them, nor because they are extorted* illegally (though there may be cases in which this would exclude them, as when a magistrate puts the accused upon his oath,) but the reason is, that in the agitation of mind in which the party is supposed to be, he is liable to be influenced by the hope of advantage or the fear of injury, *to state things which are not true.* In this connection it may not be improper to state that this influence which is to exclude the party's confession, must be *external* influence and not the mere operations of his own mind. It may be that his own reasonings may induce him to think that he will derive advantage from a confession, and he may be thus led to state things which are *untrue*, but there can be no evidence of that fact."

(n) Gresley's Equity Ev. 24.

(o) By Morton, J., in Comm. v. Knapp, 9 Pick. 497: "The slightest influence is sufficient to exclude them." By Wilde, J.: "In China, the accused is directed to be tortured to extort a confession, if the case appears suspicious. The merit of a voluntary confession seems prodigiously overrated; for any one, who comes to a magistrate and freely confesses a crime before he has been charged with it, is entitled to a free pardon, provided it be a first offence." 16 Ed. Rev. 489. How could it be possible to have a confession without influence—the torture or the promise of impunity?"

"A free and voluntary confession is deserving the highest credit, . . . but a confession forced from the mind by the *flattery of hope* or the *torture of fear*, comes in so questionable a shape that no credit ought to be given it; therefore it is rejected."(*p*) Without hope or fear, gain or loss, when was ever a confession obtained. The confession voluntary—it is an act of the will. To confess or to withhold confession? The mind, in a state of suspense, will, as in every other case, be governed by the balance of opposing motives. The confession without or against motive—without hope or fear—the expectation of gain or loss!—*credat Judæus Apella, non ego.* The common law judge, exceeding, in the prominent characteristic of his nation, the all-credulous Jew—with full faith expects action not according to, but against motive, and is on the alert to prevent evil from the miracles of his own imagining. He takes no thought, lest the descending waters, rushing over the banks, should devastate the surrounding plains. His fears are, that, by some new law of nature, ascending the hills, they should sweep away all the labors of man.

The motive internal, the confession is received; external, rejected. So the motive be not verbally suggested to the mind of the prisoner, no harm will arise. But the hope or fear may exist and not be perceived in its actual workings. It does exist, whenever there is confession. No confession exposing the individual to dishonor or danger was ever made without some adequate inducement, some hope or fear, some gain or loss, some pleasure or pain, which it was anticipated would ensue therefrom; a hope or fear arising either from the suggestions of the individual's own mind or from those of another, but equally existing and acting, wherever may have been their origin. Whether this inducement arise *ab extra vel ab intra*, its effect is none the greater or less for that cause. The only difference is in the ease with which its existence can be established. The hope or fear *ab extra*—the individual whose lips uttered the inducement was external to the party confessing, but the mind of the party confessing was responsive to these suggestions, else confession would not have ensued. It arises *ab intra*. The prisoner has arrived, from his own course of reasoning, to the same result, which in the former case was presented to his mind by some one else. Will then his convictions be the less forcible because they are his own and not another's? In each case the motives and their action are identical, the person upon whom they act, and the result the same; yet, evident as all this is, the common law acts upon this ideal distinction between external and internal motives, excluding in the one and receiving in the other, as though all were not equally internal, and none the less so, because suggested by some one external to the party confessing. The mind is the seat of action. And all motives there act and are internal, howsoever or by whomsoever presented.

Confessions, obtained "by the flattery of hope or the torture of fear," are excluded, not from any regard to public faith or the illegal mode in which they may be obtained, but solely from a fear lest they may not be true. If not true, the individual confessing guilt is innocent. The

(*p*) 2 Russell on Crimes, 645.

danger guarded against is, that of innocence falsely confessing guilt. The confession of guilt without motive, is as probable as gravitation reversed. The voluntary confession can only be heard. Innocence, it is feared, against every motive of self-regarding nature, will confess unreal crimes. Guilt comes in for no favor, for confessions obtained even by fraud or artifice, are received.(q) It is assumed, to lay the foundation of the rule, that in the majority of cases, or at any rate in so great a proportion of them, that preponderant evil will result from admission rather than rejection, that whenever external inducement is offered, as in the greater proportion of instances, the party to whom it is offered, is innocent, and being innocent, will still, carried away by the inducement offered, confess unreal crimes—the evil for the prevention of which this rule of law is established.

But what is the probability of the occurrence of this evil? In all cases, where a confession is made upon an intimation that it would be better to confess, the guilt of the individual addressed is implied, on the part of the person offering the inducement. The basis of the suggestion, the hypothesis upon which the advice is predicated, is guilt. No advice is offered, no inducement held forth, to induce innocence to confess unreal crimes. Each party, the individual to whom the inducement is offered, and the individual offering, acts toward the other on the supposition of the existence of guilt. Would then such advice, assuming guilt and advising escape through the means of true confession, induce innocence to jeopardize itself by a false one? or, if not to jeopardize—to aid itself by a false one? Is the admission of guilt the natural course by which innocence would seek to escape? The individual to whom the inducement is held forth, knows that it is addressed to him as guilty, being innocent, would he be likely, for any the slightest inducement, to permit that implication to remain undenied?

Absurd as such a reason for exclusion is, its absurdity is more fully manifested upon examining some of the instances in which, in pursuance of this exception, confessorial testimony has been excluded.

In Rex v. Shepherd,(r) the constable who apprehended the prisoner for larceny, asked him what he had done with the property, and saying, "You had better not add a lie to the crime of theft." A confession thereupon made to the constable was held inadmissible. Why? The advice is to do what? not to lie. Fearing lest the innocent, moved by such strong inducements, should falsely confess, what was said is excluded. To the unlearned in the law, the advice would seem proper; by learned eyes it is looked upon as dangerous in the extreme, ensnaring innocence within the meshes of guilt. Had the advice been to add an additional offence to that committed, would the confession have been received or not?

"I should be obliged to you if you will tell us what you know about it: if you will not, of course we can do nothing."(s) The threat therein contained seems not very apparent; the hopes or fears excited in the mind of the prisoner, imperceptible save to legal vision; whatever of

(q) The court in Rex v. Danington, 2 C. & P. 418, received as evidence against the prisoner, a letter purloined by the turnkey.

(r) 7 C. & P. 579.

(s) Rex v. Partridge, 7 C. & P. 557. The confession thereupon made was excluded.

inducement there may be, is not to confess, because if he will not, the prisoner is told that nothing can be done. Unless he will admit crime, he is distinctly informed he is safe. Would such language induce guilt, certain of impunity if silent, to turn self-accuser? Would it induce innocence doubly safe, safe from its own purity, safe from the admitted want of inculpatory evidence, falsely to acknowledge the commission of crime?

"He only wanted his money, and if the prisoner gave him that, he might go to the devil if he chose,"—thus courteously entreated, the prisoner took 11*s.* 6*d.* out of his pocket, saying, "it was all he had left of it,"—but the confession was excluded.(*t*) The intimation here is guilt. There was guilt, else the money could not have been refunded; yet the common law adjudges its exclusion. For fear of untrue confessions, true ones are rejected.

"Give me a glass of gin and I will tell you all about it."(*u*) The glass of gin given, the confession is inadmissible. For such motives, the common law assumes, innocence will put on the soiled robes of guilt. Such the inducements which judicial wisdom considers as adequate to produce false confessions. From what source does it draw such conclusions? From the recesses of the human heart?

Such are some few instances taken as mere illustrations of the practical workings of the exception already considered. In each case, was there not guilt? Would not one imagine that the criminal had "friends at court?" That here, as everywhere else, over the whole field of judicial legislation, the judge was the sworn accomplice—leagued by the strongest ties to aid—always on the watch, seeking for reasons or the pretence of reasons for the exclusion of what, if admitted, would disserve the guilty. Judge-made law, if *not* made, is *as* if made, by and for him.

But "the inducement must be of personal nature. It may be supposed that a desire to benefit a child or other near relation, may hold out as strong an inducement to falsify, as when the advantage contemplated is entirely personal."(*v*) True it might be so supposed; it would be by any one but a common lawyer. But these judicial weighers and gaugers, knowing of no feeling but that of self, abstracted from all connecting links with the rest of humanity, by their scales give the preponderance to a farthing in money or in gin, when compared with the honor, reputation or even life of a father, brother, or child,—and this estimate they call "the perfection of human reason."

But the supposed inducements may not have been offered, or notwithstanding they were, the confessions may be true.

The danger feared is of false confessions. The danger evident, so be it; the man of the law should watch. But to what purpose? To

(*t*) Rex v. Jones, R. & R. C. C. 152. (*u*) Rex v. Sexton, 2 Russ. C. & M. Rep. 645.

"The prisoner ought *not* to be *dissuaded* from making a perfectly voluntary confession, because that is shutting out one of the sources of justice." By Gurney, J., in Rex v. Greene, 5 C. & P. 312.

"Now I think as the witness did *not* caution the prisoner *not to confess*, it would be unsafe to receive such confessions." By Patterson, J., in Rex v. Swatkins, 4 C. & P. 548.

Such is the advice of the judge, as to the duty of all, and magistrates as well as others, in case of confessions. When thus clearly set forth who could expect error? (*v*) By Morton, J., in Comm. v. Knapp, 9 Pick, 497.

ascertain whether in fact the supposed inducements were offered; if offered, whether they were to any, and if to any, to what extent effective; and to see that he be not thereby deceived if they be false. But because improper inducements may be offered, or false confessions made, are all to be excluded? If the confession be true, does any inducement, whatever it may be, destroy its verity? If true, its exclusion is of just so much truth. It would be received, were it not for the supposed sinister action of the motive. Because hope or fear exist, who will say its action is of necessity in that direction? Its sinister action must be assumed, else the reason fails. But whatever the direction of the motive, it may be overbalanced by other motives, acting in an opposing direction; if so, the testimony should be received. What the direction of the motives—what their strength—what the opposing forces in any given case, would seem the proper subjects of inquiry. Such are not the inquiries of the common law judge. He can see but one motive, acting in one uniform direction on all men and at all times. Wherever he sees a motive, which he conceives may act in a sinister direction, he infers that it can act in no other. The many-sidedness of man, the infinite complexity of his internal nature, the innumerable, varying, opposing motives which may operate upon that nature, never occur to a mind which has established as an axiom, the universally perjurious power of a farthing, whether in possession, reversion, or remainder.

Whether the confession of guilt be caused by hope or fear, and whether, if so caused, it be true or false, are, or rather should be, questions of fact,(*w*) to be determined in the same mode as all other similar questions. The visionary and theoretic judge, ignorant of the parties, of the motives inducing, and the attendant circumstances, decides before hearing, that all confessions thus obtained will be false. How can his judgment compare with the practical man, who perceives not merely the insulated fact, but the *circumstantia*—the surrounding and concentring facts. Why not permit the jury to decide on this as on any other evidence, and to determine from the whole submitted, whether the confessions are false or not? Because centuries ago it was judicially foreseen, with more than prophetic vision, that through all coming time, confessions extorted by hope or fear, or the slightest inducement of any kind would be false, and being false, their future exclusion was foreordained.

Notwithstanding the rules of law on the subject, the testimony thus excluded, in some very important respects, is more entitled to confidence than the supposed voluntary but unintentional confession, of the prisoner, which the law considers the "highest evidence," because it is

(*w*) State v. Jenkins, 2 Tyler's Vt. Rep. 377. "The confession of a person on trial for a crime, must be submitted to and weighed by a jury; if extorted by personal suffering, it ought not to weigh in the least,—if *produced by fear or flattery*, the jury must *determine whether it is true or not;* but if unsupported by corroborating circumstances, it cannot operate to convict."

"Indeed, I have sometimes *doubted* whether confessions, with their *accompanying circumstances, ought not always to be received in evidence;* but the law is settled otherwise." By Morton, J., in Comm. v. Knapp.

The expediency of the law as it is, does not seem to commend itself to the clear head and sound and discriminating mind of Mr. Justice Morton. Indeed, nothing but the inviolability of precedents sustains much of what is laid down as law.

a confession made and uttered as such,—and very little likely to be made unless true; while much of what is received is mere casual, thoughtless remark, and entitled to little weight. Confessions, "influenced by the flattery of hope or the torture of fear," it is seen, have been excluded in criminal cases, because instead of "accelerating and clearing," they "impede and foul the current of justice."(x) But the same confessions of the same individual, excluded in a criminal trial,(y) transferred to the civil side for judicial use, are unhesitatingly received. To preserve an apparent self-consistency, the judge has found it necessary to change either his wig or his title, when he reversed the rules of law on the same subject; but in this instance the formality is dispensed with. Excluded in a criminal case, because the confession was caused by hope or fear, and consequently untrue, the same reason should apply with equal cogency in a civil cause, unless it be that truth is less desirable in that class of actions, or that the same statement varies from truth to falsehood, and back, according to the use to which it is appropriated. But it would seem, that with the most utter inconsistency, the same reason, with the same testimony of the same individual, and in relation to the same facts, ceases to be applicable in case the process is changed from the state as plaintiff to that of the individual injured.

Disastrous as is the action of hope or fear on innocence, excluded as are confessions obtained through their action, lest the current of justice should thereby be "impeded and fouled," it would seem that their sinister effect ceases when applied to guilt. The accomplice, testifying under a hope of pardon, dependent upon his testimony, is received. In his case, the desire of self-preservation may induce falsehood to the injury of innocence. That it should, is as, if not more, probable, than that innocence should attempt escape through the devious path of false confession. If those motives will induce innocence to state untruth, will they not be likely to have more power over guilt? and will not guilt sooner testify falsely to the injury of innocence, than innocence turn its own destroyer?

We have thus analyzed and compared some of the inconsistencies of the law on this subject. Were it more fully examined, those inconsistencies might be still more clearly developed. But the object in view will be fully answered, if the attention of others should be called to the subject.(z)

(x) 6 Pet. Abr. 83, Confessions.

(y) Parol evidence of a confession, made *under a promise of pardon*, is admissible in a civil action: the public officer cannot, by such engagements, affect the rights of individuals. Patten v. Freeman, 1 Cox, N. J. Rep. 113.

If untrue, the rights of individuals require the exclusion of such testimony, in civil equally as in criminal cases.

(z) The Mahometan law prefers confession before all other evidence; but to found a conviction of murder, the confession must declare the deadly act to have been wilful. Whatever may be stated in explanation, is to be taken as part of the confession.

In case of fornication, the confession requisite to establish the charge must be made by a person of sound mind and mature age, at four different times, at four different sittings of the Kazee, who is directed to turn the party away, without receiving the confession till the fourth time, and is authorized to suggest a denial or the mention of circumstances which may exculpate or absolve from the legal penalty.

Confessions may be retracted at any time, even during the infliction of punishment, and the party must then be set free. A conviction cannot be founded partly on confession and partly on evidence.

Report on the affairs of the East India Company to the House of Commons, in 1832, Judicial. Part 2, p. 699.

CHAPTER XII.

HEARSAY EVIDENCE.

In the case of confessional hearsay, the party, whose supposed hearsay declarations were used, was or might have been present and subject to confrontation and judicial interrogation. No reason, no sufficient reason, it has been seen, exists for not enforcing his attendance and procuring his testimony under the best possible forms and with the highest securities for trustworthiness. Instead of which, rejecting his testimony, the common law receives his hearsay, confessional declarations under circumstances the most dangerous to the interests of justice, and in utter disregard of the true principles of correct judicial administration.

In the ordinary case of testimony, it is the testifying witness on whom reliance is placed and upon whose testimony judgment is formed. In the case of hearsay, whether confessional or other, there are at least two and may be more witnesses, whose conjoint testimony, original and reported, serves as the foundation of judicial decision. When the percipient and the narrating witness are united in the same person, if he speak the truth and be believed, he determines the cause. In hearsay, the narrating is avowedly not the percipient witness; he speaks or purports to speak from the narration of others and those others are the efficient witnesses. There may have been no such supposed relators, whose alleged conversations the testifying witness reports; or, being such, their relations may have been partially or entirely false, either from simple incorrectness, incompleteness, temerity or design; or, being true, they may have been misunderstood, misrecollected or misreported.

The same evidence is designated by different names, according as the person, whose rights are thereby to be affected, varies; confession, when used against the party from whose lips it is supposed to have proceeded; hearsay, when offered to affect the rights and interests of individuals other than the party uttering or supposed to have uttered such statements or those succeeding to his rights. As confession, the party, the real witness attainable and excluded, the propriety of its reception has been examined. As hearsay, the witness dead or unattainable, the question of admission is presented under very different conditions. This question we propose to consider.

Hearsay being an inferior species of evidence should never be received, except in those cases, when from death or other sufficient cause, better proof is unattainable. This subject will therefore be examined in reference only to such cases, for if better evidence is attainable, no sufficient reason for withholding it can be imagined.

In the case now proposed for examination, the real witness, whose supposed statements, verbal or written, constitute the proof offered, has deceased, and his presence and judicial examination are unattainable. In the case of confession, the party being examinable if required, his hearsay declarations are not the best evidence; but here the original witness being unexaminable, they are.

It is desirable, that all evidence offered in judicial proceedings should be true; but all evidence offered is not true; yet that circumstance furnishes no sufficient argument for the exclusion of any testimony, unless it can be judicially foreseen and foreknown that such testimony will be false. To exclude, is to assume such falsehood as certain, before the evidence excluded has even been heard.

It is equally desirable, that all testimony should have all possible and conceivable securities for trustworthiness, but if from any cause, the attainment of one or more of those securities becomes physically impracticable, that will not suffice for the rejection of such evidence thus obtained, if it have any the slightest probative force. No circumstance, which gives the least clue to the detection of crime, is to be disregarded; nor should any evidence, howsoever weak if of any force, be, rejected.

The best evidence, the highest securities for testimonial veracity are required; but the best theoretic evidence, the best theoretic securities, may be unattainable. The best evidence, and the best attainable evidence, mean or should mean one and the same thing. "The meaning(*a*) of this rule is, not that courts of law require the strongest possible assurance of the matter in question, but that no evidence shall be given, which from the nature of things supposes still greater evidence behind in the party's possession or power." "It(*b*) never excludes evidence, which is the best that can then be produced by the party."

If then, these principles be adopted, it would seem to follow, that when the witness is dead, his declarations in whatsoever form attainable should be received. But logical conclusions, from principles ever so well established, will generally be viewed by the court as legal *non sequiturs*. Accordingly, this evidence logically admissible, legally is excluded.

Evidence may be true, whatever or howsoever much the securities for trustworthiness may be wanting. It may be true without, it may be false with them all. Whether it will be true or false is given to no prophetic vision to foresee.

The utmost possible securities for trustworthiness should be obtained, but if from any cause these securities are unattainable, the argument thereby afforded is for caution and circumspection, not exclusion. When evidence with all known securities for truth can be had, nothing will justify the reception of that which is inferior in strength and trustworthiness. These securities unattainable, and the evidence excluded, it being the only existent proof of the subject-matter to which it refers, injustice, misdecision, irremediable, inexcusable, is the inevitable consequence.

(*a*) 1 Phil. Ev. 176.

(*b*) 1 Stark. Ev. 39.

While then on the one hand, no evidence should be received without, if obtainable with the highest securities for veracity, so on the other hand no testimony should be excluded on account of any deficiencies, which are unavoidable.

The whole conduct of life, its ordinary transactions, the most important mercantile negotiations, all historical facts, the proofs of our religion, are based on evidence, which no court of common law would receive as deserving of any—the slightest reliance. It is then abundantly manifest, that the judicial mind is governed by rules which are entirely disregarded in the ordinary transactions of life.

The epistles of Paul, the journal of Columbus, the letters of Washington, would not be adjudged competent to establish any fact, which being in issue might be determined by their production; not because, if received they would not satisfy every individual of the facts therein contained; but because, while having probative force sufficient to command the belief of every mind, to which they should be communicated, it is feared danger would be likely to arise from submitting such testimony to the consideration of the tribunal, by which rights are to be adjudicated upon. Were Paul, or Columbus, or Washington living, the reasoning by which this testimony would be excluded might be considered as unanswerable; dead, their evidence thus delivered satisfactory to every body else, to the judge alone seems without force.(c)

"In the common concerns of life, evidence of this nature is frequently, nay, usually acted upon without scruple; but in the ordinary affairs, there is, in general, no considerable temptation to deceive; on the contrary, a legal investigation of a fact which involves the highest and dearest interests of the parties concerned, property, character, nay liberty or life itself, presents the greatest possible temptation to deceive; and therefore that evidence, which is admitted before a jury must be guarded and secured by greater restraints and stricter rules than those which are sufficient for the common purposes of life."(d) Hearsay then is evidence "acted upon without scruple in the ordinary affairs of life," evidence of "great moral weight," evidence from which men of "common sense and experience derive much assistance" in coming to just conclusions; but which judicially has no moral weight, and from which judicially no assistance could be derived in coming to just conclusions, or, if any, the danger from such aid exceeds the probability of good, so that practically the law says no aid can be derived from this kind of proof. Acted upon without

(c) Not without force, but still worse, having force and excluded. "By the rules of evidence established by the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion. . . . . lest they should produce an undue influence upon the minds of persons unaccustomed to consider the restrictions and limitations which legal views on the subject would impose." Wright v. Totham, 34 E. C. L. R. 114. S. C. 33 E. C. L. R. 456. S. C. 28 E. C. L. R. 11. S. C. 2 Russ. & Mylne, 19. "There are many acts involving a great sacrifice of present interests . . . and therefore as moral evidence, they may be very cogent; yet does the law more rigid and inflexible resist the weight of such moral evidence, although in the ordinary transactions of common life, common sense and experience might possibly yield to it." S. C. 33 E. C. L. R. 456, 457.

(d) 1 Stark. Ev. 43.

scruple and to advantage in the ordinary affairs of life, why is or should there be a different rule in judicial investigations?

Judicial investigations may involve "the highest and dearest interests," yet such cases are rare;—its usual and common action is upon the "ordinary affairs of life," in which it would seem this testimony is deserving of credence. When cases of this description are brought before the court why not receive testimony thus proved and approved? How or why does the probative force of the same fact, proved in the same way, change, whether used as the foundation of a judgment judicial or extrajudicial? How or why does the ability of the individual to weigh it vary, whether it is used for one purpose or another? Even in important cases, cases involving the highest interests, why adopt rules different from those which serve for guidance in the "common and ordinary affairs of life?" This species of evidence is "very cogent"—has "moral weight"—and justly or not; if yea, the more important the cause, the greater necessity of its introduction; the force of the same proof is unchanged, whether used in an important(*e*) or an unimportant cause,—one involving larger or smaller interests; if nay, why ever trust to a broken reed, why ever rely on such evidence?

Two reasons have been assigned for the rejection of this testimony, first, its inherent defects, as testimony, and, secondly, the character of the tribunal which is to decide upon it.

A distinguished writer on evidence,(*f*) an exclusionist upon principle, thus illustrates this subject. "Suppose that A., a person of undoubted credit, had asserted, that he saw B. inflict a mortal wound upon C.; a party who knew A. to be a man of the strictest veracity, and who was also convinced that he had gravely made that assertion, would necessarily attach some degree of credit to it, and its effect might be to turn the scale and to create in his mind a conviction of the truth of the fact, of which he might otherwise have doubted. In such case, therefore, if A. be dead and B. charged with the death of C., why should not the declarations of C. be admitted as evidence?" Were the proposition generalized to all cases of the declarations of deceased witnesses which have a bearing on the cause, the same question occurs. The question thus generalized is answered in the negative. The reasons therefor are now to be considered.

"It may be answered," the same writer proceeds to add, "that the law must proceed by general and by certain rules. If, therefore, the mere declarations of A., in this case, were to be admitted, it would follow, that the declaration of every other person, with respect to every other disputed fact, would be admissible. The consequences would be to let in numberless wanton, careless, and unfounded assertions, unworthy of the least regard. The principle would extend to all the loose, idle and contradictory conversation, that had taken place upon the sub-

(*e*) Important—unimportant—no case without importance; important to one from the amount, it may be unimportant to another. A dollar is important to the day-laborer, unimportant to the millionaire. Do principles therefore change? Is the property basis to determine the admissibility of evidence?

(*f*) 1 Stark. Ev. 44.

ject in dispute, to none of which any degree of credit could be safely attached; and, above all, the evidence would be wholly unsupported by those tests of truth which the law in general requires; it would not rest upon the obligation of an oath: there would be no certainty, either as to the means of knowledge or as to the faithful transmission, by the asserting party, of that which he knew."

"The law must proceed by general and certain rules." True, but the generality of those rules, the certainty of those rules, is the same, whether they are rules of admission or of exclusion. They may be as general, as certain, receiving as excluding the testimony. The true question is, not the certainty or the generality, but their logical propriety, their fitness to promote the real purposes of justice. They may be ever so general and ever so certain, and as bad as they are general and certain.

"If, therefore, the mere declarations of A., in this case, were to be admitted, it would follow, that the declarations of every other person with respect to every other disputed fact, would also be admissible." Admissible, but only in analogous cases, not under dissimilar circumstances. If the declarations of A. were received, it would by no means follow, that the declarations of B., a witness living and subject to the process of the court, should be received as to any or every other fact, when better evidence is within its power. If the admission of the declarations of A. be in themselves proper, though that admission be followed by ever so many similar ones, it would be no objection to the first precedent. The danger feared is not so much in the case cited by way of illustration, as in the illegitimate inferences, which it is feared may be drawn from the premises.

"The consequence would be to let in numberless wanton, careless, and unfounded assertions, unworthy of the least regard." The evidence proposed by way of sample has none of the qualities suggested. Why the admission of evidence of that description is necessarily to be followed by the consequences suggested, is not so easily perceived. If "unworthy of the least regard," if wanton, careless and unfounded," they would probably receive but little regard. The receiving the declarations of deceased percipient witnesses, does not justify the admission of "wanton, careless, and unfounded" assertions. The inference exceeds the premises. The premises are the admission of relevant, the inference the admission of irrelevant evidence.

Whether thus "wanton, careless and unfounded" would seem to be a question which could best be determined after the evidence was heard—not before. If the evidence should be of the character anticipated, it would hardly be offered, for it would be undeserving of credit; if not, then the anticipated objection would not arise.

"The principle would extend to all the loose, idle, and contradictory conversations, that had taken place upon the matter in dispute, to none of which could any degree of credit be safely attached." The principle—what principle would thus extend? The reported testimony of the supposed percipient, but now deceased witness, consists only of such facts as could have been proved by him, if living; of facts seen, heard, known by him. The hearsay would be of competent evidence. It involves no

new rules. "Loose, idle, contradictory, conversations" of deceased witnesses would no more be received, because the witness, whose conversations they purport to be, is dead, than if he were living. The difference in the two cases consists only in the medium, through which it comes; in the one case immediately from the living, in the other, mediately, through the lips of the reporting witness. What is or is adjudged to be pertinent, in either case, is alone to be received. The only difference is in the mode of proving the same facts.

"Above all, the testimony would be unsupported by those tests, which the law in general requires: it would not rest upon the obligation of an oath." So far as those tests are valuable and are wanting, so far just ground is afforded for deducting from the weight of testimony thus deficient. The value of those tests established, their absence is the loss of a corresponding degree of credibility. What is that value is a question hereafter to be considered, when they shall form the subject matter of discussion. But the admitted inferiority of this testimony is no ground for its utter exclusion.

"There would be no certainty as to the means of knowledge or as to the faithful transmission by the asserting party of that which he knew." The means of knowledge on the part of the percipient witness, the grounds of his statements, are partially or fully disclosed to the narrating witness, and those means, as disclosed, are by him made known, and as far as they existed, to that extent alone, should credit be yielded to them. Their faithful transmission by the percipient witness (fraud excepted, which is to be hereafter considered) so far as transmitted, is established by that presumption of the general truth of testimony, which experience has sanctioned. Its faithful transmission by the narrating witness is guaranteed by the same securities, which suffice for all other testimony. The certainty as to the means of knowledge and its faithful transmission is the same as of every fact extrajudicially reported, and is sufficient "for reasonable beings to form their judgments and act upon,"(*g*) in the ordinary business of life. If no fact, unless judicially proved, was sufficient to authorize human action, the whole fabric of society would stop.

"If the circumstance, that the eye-witness of any fact be dead, should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be established by proof so easily obtained."(*h*)

The witness, by whom, if living, it might have been proved, that a contract, note, deed or will, had been obtained by imposition, fraud or duress, or, by whom any supposable fact important in its bearing to the cause might have been shown, is dead. No occasion, where this testimony could have been used, occurred during the life-time of the witness. That a supposititious will existed, how, when, or in what manner procured, that his name had been forged to a note, or that a deed, by which his rights were impaired, had been obtained by duress; the existence or need of testimony, by which such facts might have been established, were all

(*g*) Wright and Totham, 33 E. C. L. R. 431.
(*h*) By Marshall, C. J., in Mima v. Hepburn, 7 Cranch, Rep. 290.

unknown to the party whose interests were thus endangered. There was no existent cause, in which, if known, it could have been taken; no future cause foreseen in which its future use would be needed. The witness dies. Litigation arises. It is ascertained, that in a letter or memorandum made at the time, or in a conversation, casual or otherwise, the witness had detailed facts, upon which important rights are subsequently made to depend; or that in a deposition in a cause between other parties, in which similar or different rights were at stake, proof might be had materially relevant to the cause now pending before the court. The deceased was the sole witness of a fact now for the first time known, or, known to be important. Death has closed the door to his production. His conversations, his letters, his *ex parte*, his *alia in causa* depositions exist. Without this proof, fraud with certainty succeeds; without it, total darkness reigns. With it, light uncertain, wavering, but light, through a mere crevice, be it so, is obtained. Is it not preferable to total darkness?

"If, when the eye-witness is dead," his declarations, however clearly made, however distinctly reported, are not received, how can any one feel "safe" in his property, a claim to which "can only be supported by proof of this description." Is not every such person "safer," are not his rights "safer," are they not utterly insecure, save by the reception of this testimony? The feeling of "safety" in one's possession more fully requires its reception than its rejection. It may as well be necessary for the protection of right, as fabricated for the enforcement of wrong.

"Proof so easily obtained,"(*i*) . . . "evidence which may so easily and securely be fabricated."(*k*) Why thus easily obtained, thus securely fabricated? The narrating witness relates what he has gathered in conversation from the deceased witness, with the same degree of caution; the proof is the same with which the court are satisfied in relation to the reported statements or confessions of a party, or the extra-judicial statements of any witness, when adduced to contradict his judicial and sworn testimony. The witness, whether narrating the statements of one living or dead, or any other fact in the cause, is subject alike to the same penalties, bound by the same oath, scrutinized by the same cross-examination, and would not, therefore, seem more to be distrusted in the one case than in the other. He is as much a witness, as credible a witness, when testifying to one set of facts as another. Whether he relates his own perceptions or the reported perceptions of another; the securities for testimonial veracity are the same in each. So far as the public are concerned, the protection against perjury, so far as the witness is to be regarded, the guaranties for his trustworthiness, are as strong, the temptations to mendacity as weak, when testifying to hearsay as when testifying to any other fact. Whence then the ease, the security? It is the general ease and security of perjury, nothing more. The ease of fabrication is not on the part of the judicial witness.

(*i*) "The frauds which might be practised under its cover," &c. 7 Cranch, 290.
(*k*) 1 St. Ev. 46.

How is it as to the deceased witness. By the hypothesis, true in every case except that of deliberate and preconcerted fraud, there is integrity on the part of the deceased individuals, whose supposed declarations are offered for admission, and, if so, reliance may be placed in such declarations.

That this evidence might be fabricated, that letters stating false facts might be written, that false entries might be made, that conversations rehearsing non-existent acts, and designed for deception, might be held, is established by judicial experience; for the forms of fraud are as various as are the minds of those conceiving or committing it. But, by the same experience, the still more frequent existence of perjury is proved; and shall, therefore, all testimony be shut out?

The supposed witness, whose statements are offered, honest, the idea of fabrication is at once precluded. The present or future importance of the facts, their subsequent use, the case in which, the person for whom, the time when, they are to be used, are alike unknown and unforeseen. They are then the undesigned casual remarks of a percipient witness; incomplete, incorrect in detail, perhaps, but nevertheless deserving consideration; the same consideration which the statements of an honest individual, extra-judicially delivered, should ever receive. The declarations designed for future use, deliberately made, their value is thereby enhanced. If incorrectly reported, by design, it is not fabrication, but simple perjury.

The extra-judicial deceased witness dishonest; in his lifetime prescience was not vouchsafed him; yet without the foreknowledge of such future cause, the need of such fabricated testimony will not be perceived, nor will the motive to its fabrication exist.

Future litigation anticipated, the need of this testimony foreseen, its deliberate fabrication the result of preconcerted design, and in support of an unfounded claim. Such the supposition. The alleged real witness, whose false declarations are prospectively made for future use, and whose opportune death before the testimony will be required is not an accidental but an essential prerequisite to its consummation, the party to gain by the fraud, and for whose advantage these fraudulent preliminaries have been concerted, and the intended narrating witness from whom the evidence is to be received, are all interested in the success and associated in the accomplishment of this scheme. It must be seasonably entered into, *ante litem motam*, for if not according to law, however good a plot, however excellent a plot, it must fail; the fact falsely asserted must be one unsusceptible of disproof, else it might be contradicted; and the cause one which will quietly wait till all needed arrangements shall have been made, and come, when being made it shall be called for.(*l*)

The individual, whose interests are thus to be subserved, is necessarily a party, for mere speculative, abstract fraud, committed without motive and for the benefit of another is not to be supposed. He must live and

(*l*) "The purpose you undertake is dangerous, the friends you have named uncertain, the time itself unsorted, and your whole plot too light for the counterpoise of so great an opposition."

outlive, or dying, he must by nuncupative will or otherwise, bequeath to some heir or devisee, equally unscrupulous, his false claim and his fraudulent devices, else the false claim will never be asserted, nor the fabricated proof, by means of which, its successful result is anticipated, be known.

The supposed percipient and deceased witness was without legal or personal interest, (except so far as he was induced by "the value received," by which his aid was purchased) in the *post mortem* deception, hereafter to be effected. The consummation of the plot is to be postponed till after his decease, whenever that may be, and if he be the longest liver, it must entirely fail, unless some new and longer living witness can be found to testify, who will supply the place and discharge the duties of the deceased narrating witness. It was the duty of the supposed percipient and deceased witness(*m*) to make certain declarations either verbally or in writing, in and by which he asserted certain facts false in themselves, and known to him to be false as having been done to his knowledge, or certain conversations which were never had, as having been held in his presence, with the intention and in the expectation that at some period of time subsequent to his decease, they would be used in *the cause* for which they had been thus studiously prepared. Being exempt from the fear of punishment and the danger of cross-examination, he makes these fraudulent and false statements to some individual, who, after his decease, was to bear witness to them as having been received from him, thus incurring the moral turpitude of perjury without a risk of its legal penalties.

To be available, the selected narrating witness must not merely outlive the supposed real witness, but he must live till the time shall arrive, when this evidence shall be needed. A party to the fraud, restrained by the sanctions of an oath, exposed to the risk of detection, probed by the rigid and unsparing scrutiny of examination and cross-examination, fabrication, and this peculiar mode of fabrication foreseen as probable, foreseen as *so probable*, that the court would not wait till it should occur, but in advance prejudged its future existence, and acted upon such judgment, what is the danger of a fabrication like this, or if fabrication be supposed probable, what is the danger of its successful termination?

Future litigation anticipated, that anticipation known to the party and the narrating witness, what is the fact to be proved by these declarations; one known to many, if so, they are liable to contradiction and disproof by them, if living, by their reported declarations, if dead; known to the deceased alone, or so alleged, why then was not his deposition so necessary for the preservation of the rights in danger, taken? Why not take measures to preserve in the best form what it was so desirable should be perpetuated? Is such knowledge falsely denied, then is the narrating

(*m*) . . . . "It may be feared that persons who have as little regard to truth may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till after death." Berkely peerage case, 4 Camp. R. 411.

(*n*) 13 Pet. 209.

witness guilty of perjury; is it admitted, what satisfactory answer can be given to the inquiry?

The deceased witness a party to the fraud thus attempted, the narrating witness a party, the person calling him a party, the more individuals cognizant of the scheme, the greater the chances of detection and failure. Some one may repent of the intended fraud, death may intervene, or the remembered declarations or preserved letters of some deceased or the judicial testimony of some living witness may expose and defeat this triple scoundrelism.

If there be fraud only on the part of the individual to be benefited, and of the supposed percipient witness, how can it be known that this predestined judicial witness will remember what, being innocent of design, may to him seem little worthy of recollection, or that if the fact be one of apparent importance, he may not disclose it and thus prevent the plans ever reaching maturity.

This species of testimony, from its inherent and unavoidable weakness, presents no sufficient motive for fabrication. The course is too devious, the machinery too complicated, too liable to miscarriage, and too powerless in its results, to be adopted by one studious of fraud though ever so indifferent to the mode by which it is to be effected. A fortunate conjunction of circumstances, of facts unsusceptible of disproof, of trusty conspirators, of ever ready and judicious perjury, of duly preserved lives and well-timed and obsequious deaths, is necessary, that the desired proof should be ready at its need; how much more then for its fortunate issue.

Analysed, the danger of fabrication and of perjury is one no more peculiar to what is avowedly derivative, than to what is primitive, a danger as applicable to any other mode of proving facts as this. Indeed, less so, for fabrication and perjury are means too expensive and dangerous for the probable gain to be derived from this kind of evidence. The weaker the probative force of this testimony, the less the danger. He, who will resort to perjury or fabrication, to accomplish his ends, will fabricate the best evidence.

"Another reason(*o*) for the rejection of such evidence arises from the nature and constitution of the tribunal whose minds are to be convinced. If it were to be assumed, that one who had been long inured to judicial habits(*p*) might be able to assign to such evidence just so much and no greater credit than it deserved; yet upon the minds of a jury unskilled in the nature of judicial proof, evidence of this kind would frequently make an erroneous impression. Being accustomed, in the common concerns of life, to act upon hearsay and report, they would naturally be in-

(*o*) 1 St. Ev. 45.

(*p*) A specimen of what judicial habits will do. "Le parliament de Toulouse a un usage bien singulier, dans les preuves par temoins. On admet ailleurs des demi-preuves, qui au fond ne sont que des doutes: car en fait qu'il n'y a point de demi-verites: mais à Toulouse on admit des quartes et des huitiemes de preuves. On y peut regarder, par example, un ouï-dire, comme un quart un autre ouï-dire plus vague comme une huitieme: de sorte que huit rumeurs que ne sont qu'un echo d'un bruit mal fondé, peuvent devenir un preuve complete; et c'est à peu pres sur ce principe que Jean Calas fut condamné à la roue. Les Lois Romaines exigeaient des preuves luce meridiana clariores." *Oeuvres de Voltaire, Tome* xxxiv. 320.

clined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence; they would, in consequence of their previous habits, be apt to forget how little reliance ought to be placed upon evidence which may so easily and securely be fabricated; their minds would be confused and embarrassed by a mass of conflicting testimony; and they would be liable to be prejudiced and biased by the character of the person from whom the evidence was derived."

"Being accustomed in the common concerns of life to act upon hearsay and report, they would naturally be inclined to give such credit when acting judicially." Such credit, what credit? The same which extrajudicially they had given, judicially they would give. Why should they not?

However little reliance there may be on this evidence, however easily fabricated, the want of reliance, the ease of fabrication, is no greater in judicial than in extrajudicial evidence. Indeed on examination it will be perceived that judicial evidence presents the least opportunity for fabrication, and the greatest means of detection. The situation of the supposed percipient and deceased witness is not varied by any subsequent fraud to be perpetrated through his testimony, in whatever mode it be effected. The narrating extrajudicial witness fabricating or reporting the fabrications of others, is neither under the obligation of an oath nor subject to the scrutiny of adverse interrogation. Not so when judicially a witness. Oath and cross-examination are operating on his mind. He is liable to detection and consequent infamy and punishment. The hearsay witness *quoad* the facts related by him is equally under the wholesome restraints of law, whether the facts related by him are his own perceptions or the reported perceptions of another. The securities are the same as exist as to all testimony. The danger is anterior to the last witness, the narrating witness. The percipient or alleged percipient witness, is in each case alike free from legal restraint. The difference between the two cases consists in this, that while in each the real witness, as from the nature of the case he must be, is unseen and unscrutinized; in the one case you have the narrating witness testifying under the known and recognized securities for trustworthiness, in the other under none. Now, unless those securities are positively pernicious, if this evidence may be acted upon without danger in their absence in the ordinary concerns of life, why not judicially, with their presence? If a certain degree of credit can be given to this testimony extrajudicially, why should not such, nay, why should not more credit be given to it judicially?

"Unable to reduce such evidence to its proper standard." How or why does this inevitably arise? Does sudden inability seize the judge of fact? Is the investiture of the judicial function followed by judicial blindness and mental imbecility. Competent with safety extrajudicially, does his capacity vanish, as the securities for truth increase and the dangers of falsehood diminish?

"When placed in competition with more certain and satisfactory evidence." Evidence of the highest and lowest character for trustworthi-

ness, to be compared, and the jury incompetent to this task? For what are they competent? "More certain and satisfactory" yielding to less certain and satisfactory? Unable to distinguish between more and less, what can they do? What possible case is there, where there is not this comparison between the more and the less trustworthy to be made? What easier to be done? If it can, it is to be done; why is the difficulty greater in this than in other cases?

"They would be apt to forget how little reliance ought to be placed upon evidence which may be so easily and securely fabricated." They know, it seems, but when specially called on to adjudicate upon a mass of conflicting evidence, memory would fail then. Remembering out of court, they forget in court.

"Confused and embarrassed by a mass of conflicting evidence." What, then, should none but *ex parte* evidence be received? To save the judge of fact from embarrassment, shall all conflicting evidence be excluded? Shall causes be heard by the halves, lest if heard by the whole there should be embarrassment and confusion on the part of the judge? Conflicting testimony excluded, decision is freed from embarrassment. All testimony excluded, and decision by lot, it is still less embarrassing. Such the reason, the character of the judge of fact correctly given; change your judge, not reserve all your sympathy for his weakness, and none for the litigant.

"Because no man can tell what effect it would have on their minds."(q) Then no man can tell that it will have an undue and improper effect on their minds. What effect? The right effect probably.

In all controverted cases, there is much of conflicting evidence, some of which is false, intentionally or not; but of such testimony, of all testimony delivered to a jury, the effect on their minds cannot be foreseen. If this impossibility to foresee was a good cause for rejection, what proof would be received? Must the effect of testimony be known by anticipation, before it can be introduced? Because they cannot tell whether this testimony would produce its just effect or not, must they shut it out entirely? Could they tell the effect, they would receive it. If they cannot tell, *why act as if they could tell,* and tell, too, that its effect would always be wrong? Uncertainty as to the just appreciation of testimony a reason for its exclusion! Of what testimony can any one be certain, that he will truly and accurately appreciate its force? Is there any? How then can he, assuming infallibility, dare to determine, that the judgment of others will always be erroneous. Is one's judgment without the means of knowledge, better than with?

A great fallacy is it to imagine, that, "whatever is *morally convincing* and whatever *reasonable beings* would form their judgments and act

(q) 4 Camp. Rep. 415. "The judges think there is no danger in listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves to disregard the hearsay, or to give it any little weight it may seem to deserve." Why not then receive it in equity?

upon may be submitted to a jury."(r) Why not? Is it because a jury is not composed of "reasonable beings," or because the common law presumes them not to be reasonable, and therefore will not submit to their consideration what is "morally convincing?" Or is it that they who prescribe these rules are not reasonable beings? Want of reason either in the court or the jury lays most manifestly at their foundation. Is it in those who make, or those for whom, without fault on their part, such rules have been made?

The argument considered has no relation to the probable force, but simply to the reception of the evidence. Its acknowledged inferiority from the absence of certain securities in themselves desirable, will obviously detract much from the weight which this evidence would obtain, but will not impair the position, that it affords some grounds for reliance and should therefore be received. It may be laid down as a canon of evidence, that no circumstance, however slight, no relevant testimony, howsoever weak, which by any legitimate process of reasoning can aid the jury in arriving at correct results, which can have any bearing on the cause, should be rejected.

Of no testimony, of no witness, can the precise value and trustworthiness be predetermined by any set and prescribed rules.(s) Of this, as of all other testimony, the real value in each instance can only be ascertained by a careful examination of the attendant circumstances. The time when, the place where, the person to whom, the purposes for which, the supposed declarations were made; the situation and means of knowledge, of the witness making them, the mode in which made, whether oral or written, the relation of the person making them to the party to be benefited,—to the acts declared;—the accuracy of his original perceptions, his memory and the motives for such accuracy and recollection, the mode of transmission, the number and situation of the individuals through whom transmitted, their recital of them to the narrating witness and the reasons of such recital; whether designed or undesigned; voluntary or involuntary, interrogated or uninterrogated, whether made in expectation of future use or not; are facts to be carefully canvassed in determining the degree of confidence to be placed in this testimony.

To a similar scrutiny is the narrating witness to be exposed. His account to the party calling him—when, where, by whom and for what purpose was this supposed conversation, which he purports to detail, commenced, how conducted, the attention of the witness, his recollection, the reasons therefor, when was this knowledge made known to the party by whom he is called, all, every fact, by which his situation can be determined, is to be carefully examined, as on these depends the reliance to be placed in his testimony.

(r) By Coleridge, J., in Wright v. Totham, 33 E. C. L. R. 431. This case, which has for several terms undergone full discussion in the several courts of England, well deserves and will amply repay attention and consideration.

(s) How those interest-dreading, perjury-fearing chancellors weigh evidence, is seen in the rule by which such extraordinary confidence is required to be reposed, under all circumstances, in the wrong-doing defendant's answer. How civil lawyers prescribe, is seen in their half, quarter, eighth proof, &c., &c.

The form in which the testimony was first embodied, or subsequently transmitted, materially affect its value, not its admissibility. The permanence of written communication, its superiority as a mode of transmission over oral, is abundantly apparent. The defects of oral hearsay, defects of perception or transmission, have no existence in written hearsay. If the original entry, letter, or document be produced, which written years before purports to relate events as having then transpired, the documents genuine, they are manifestly as the casual and undesigned acts of those having the means of knowledge, entitled to much consideration.

That, upon a careful scrutiny, this, as well as any other evidence, can receive its due measure of confidence, must be conceded. The dangers of this species of testimony, so distinctly perceived, the causes of distrust so well known and appreciated, there seem slight grounds of apprehension, that it will receive an undue and unmerited or unlimited confidence.

It will however be found, that the common law judges, though thus acutely sensitive to the evils of this kind of proof, are yet willing to receive it under every variety of form and with every imaginable ground of distrust. A cursory examination of the several exceptions to this rule, will show most fully, their little regard either to general principles, to their own rules, or to logical consistency. Those rules, the best possible—"rules matured by the wisdom of ages," "revered from their antiquity and the good sense in which they are founded," are yet from necessity violated by innumerable exceptions equally wise, equally matured and equally revered. How these exceptions to the best possible rules comport with each other and with those rules, remains to be seen.

Exceptions. Dying declarations. "The dying(*t*) declarations of a person, who has received a mortal injury, that is, declarations made under the apprehension of death, are constantly admitted in criminal prosecutions, and are not liable to the common objection against hearsay evidence. The principle of this exception to the general rule is founded on the awful situation of the dying person, which is considered to be as powerful over his conscience as the obligation of an oath, and partly on *a supposed want of interest* on the verge of the next world, which dispenses with the necessity of cross-examination."

Incompleteness and incorrectness arising from the want of cross-examination by the individual against whom the testimony is adduced, has been urged as a reason for the exclusion of hearsay. It is one undoubtedly entitled to much consideration. But giving it its due weight, how or why is the objection, arising from the absence of that security, removed by the "*supposed want of interest*" in the individual whose statements are offered? Does that dispense with cross-examination? Does that induce accuracy and fulness of detail? If so, why ever cross-examine those who are without interest?

Nor is this all. The declarations to be received must be of a person

(*t*) 1 Phil. Ev. 215. Donelly v. State, 2 Dutcher, 463-601.

in extremis,(*u*) and of one(*v*) who is without any hope of recovery; for if that exist in ever so slight a degree, the evidence will not be received. But for effective cross-examination, the person accused, or some one representing his interests, is required. The attendant of the dying man, the future witness, has neither the requisite knowledge, nor any sufficient motive to pursue the needed inquiries. Adverse interrogation by the party whose rights are involved, by him against whom the testimony is to be used, is then out of the question, as to him it is uninterrogated testimony.

The situation of the dying man is not that best fitted to give, what alone is wanted, a full, accurate, and detailed account of the transaction. His body is weakened by disease, his mind participates in the decrepitude of the body. The mind of a dying man and the mind of a man in the full vigor of health and intellect, and their respective statements, may vary as much in clearness, distinctness, and correctness, as their bodies vary in physical strength. Yet the only legal prerequisites for admission seems to be that state of mind and body least justifying it. The bed of death affords no opportunity for examination and cross-examination. The dying man may be from weakness unable to give a detailed account,(*w*) yet his answers, mere monosyllabic responses to such suggestions and *ex parte* interrogations as may be put by the future witness —a witness adverse it may be in feeling—are received. To scrutinize these statements, to require explanations, to propose the proper questions, and thereby to elicit the whole truth, the examiner cannot, from ignorance of the attendant facts; and if he could, the bed of death is not the place, nor the dying man the person upon whom is to be spent the probing rigor of examination. The detailed, deliberate, cautious and full statements of a man in health, giving and intending to give a full report,(*x*) are excluded after his decease; while those of one weakened by disease, excruciated by pain, unable, if wishing, to be accurate, are admitted; not but that they are rightly admitted, but, that the others are erroneously rejected.

But on examination it will be found that the admissions and exclusions of death-bed declarations are not co-extensive with the reasons upon which the exceptions are based, that they are neither consistent with themselves, nor with the general rule of which they are a violation.

The case of homicide (accident or mischance excepted) assumes one party to be in the wrong, but it by no means assumes the other to be in the right; nor does the result show which, if either, was in the right. The deceased may have been the original aggressor, or without having

(*u*) They must be under an impression of almost immediate dissolution, &c., Rex v. Van Butchell, 3 C. & P. 629.

(*v*) His belief must be of the required standard for admission.

The dying declarations of a disbeliever in God and a future state are not admissible. Donelly v. State, 2 Dutcher, 464.

(*w*) The witness may be unable to relate the transactions. The evidence may be only of answers to such leading questions as somebody present may choose to put, yet the law admits them. Vass v. Commonwealth, 3 Leigh's Va. Rep. 786.

(*x*) That too, though "all the bishops on the bench should be ready to swear to what they heard these witnesses declare, and add their own implicit belief of the truth of the declarations." 4 Camp. 414.

commenced the attack, he may yet not have been without fault. If the aggressor, and in the wrong, then are received his accusatory declarations, uttered on the bed of death, without fulness or completeness—without cross-examination; while the exculpatory testimony of the accused, in the right, delivered if required, under oath, in public, and with every possible security, is rejected. Even if the dying man were in the right, it will hardly happen other than that somewhat of the bitterness of death should be infused into his narrative of the circumstances attending the fatal event. The declarations of the dying man, whether in the right or in the wrong, whether the party attacked or the party attacking, and without even an inquiry as to that fact—the declarations of the dying man, oppressed with the pangs of death are received; while the accused, the sole living witness of the transaction it may be, is refused a hearing.

Take by way of illustration a case still stronger. There was a witness to the homicide. The dying declarations of the deceased have been offered and received. The witness, by whom all the facts constitutive of a perfect defence might have been shown, has died, but dying he gave a full and detailed account of the affair. He was a chance witness, the clearness of his eye undimmed by passion, the integrity of his mind unobscured by prejudice, a cool, dispassionate, and honest observer, without bias, hatred, malice or revenge—one, who if living would have been much more deserving of credence than either of the parties to the transaction. His death-bed declarations, exonerating the accused, are offered, but rejected.(*y*) The dying declarations of the party injured, trustworthy to charge, similar declarations of a witness without interest in fact, as well as without interest from his situation, untrustworthy to discharge. Why this difference? The absence of interest, the solemnity of the occasion is equally great in each case. The necessity of the evidence the same,(*z*) unless punishment, whether deserved or not, but at all events punishment, be considered of more importance than the escape of innocence.

"Evidence of this sort is admissible in this case from the fullest necessity. For it often happens that there is no third person present to be an eye witness to the fact."(*a*) But the same thing often happens as to other crimes. They are done in secret; witnesses are not called as spectators to the commission, nor are they ever present except by accident and against the intention of the criminal. The dying declarations of the deceased in case of homicide, are received "lest the ends of justice may otherwise by his death be defeated;"(*a*) but in every other case, when such declarations are the only attainable proof, those ends will be equally defeated by exclusion. Not heard—when the accused is indicted for robbery—increase only the atrocity of the crime—let the robbery end in murder and the dying declarations are received.(*b*) What is the

(*y*) The very case supposed by way of illustrating the rule in 1 Stark. Ev. 44. The dying declarations of the accomplice are excluded when offered for the same purpose. Resp v. Langcake, 1 Yeates, 415.

(*z*) Wilson v. Boemer, 15 Johns. 291. (*a*) Jackson v. Kneffen, 2 Johns. 35.

(*b*) The dying declarations of the party robbed have been held inadmissible. Rex v. Lloyd, 4 C. & P. 239.

offence technically charged? Such is the inquiry. Is the charge that of administering poison for the purpose of procuring abortion; the dying mother's declarations, though death as well as abortion is the consequence, are refused admittance.(c) Let the indictment be for murder, and poison the mode of its accomplishment, and the same declarations of the same person are as unhesitatingly received, as in the prior case they were rejected. Properly admissible for one offence, why not for another? Why should one species of proof suffice for the conviction of one and the greater criminal and be insufficient for that of another and the less guilty? Why should one suffer punishment and the other escape with impunity?(d)

The death-bed declarations of the person killed in the case of homicide have been received. Similar declarations of a disinterested witness are tendered in a civil case. Were the evidence rejected, from any supposed danger likely to arise from the deficiencies necessarily incident to this testimony, the peril arising therefrom would be in proportion to the interests at hazard.(e) In the one case the highest penalties of the law are involved in the issue, in the other an amount of property larger or smaller, as the case may be. The testimony dangerous, the common law judge does not hesitate to receive it, when its effect will be to doom to infamy and death—if thereby a farthing's value may be in peril, his scruples forbid it should be heard. If "the situation of the dying man," if "the absence of interest" remove the dangers of hearsay, if they supply the place of oath and cross-examination in criminal, why

(c) On the trial of an indictment for the murder of A. by *poison*, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. Rex v. Baker, 2 Moody & Robinson, 53. In this case, Coltman, J., after consulting Parke, B., was of opinion, as it was all one transaction, that the declarations were admissible, and allowed them to go to the jury.

In Rex v. Hutchinson, 2 B. & C. 608, *n.*, the prisoner was indicted for administering poison to a woman pregnant, but not quick with child, with intent to procure *abortion*. The woman was dead; and for the prosecution, evidence of her dying declarations on the subject were tendered. The evidence was rejected by Bailey, J., who observed that although the declarations might relate to the cause of the death, *still such declarations were admissible in those cases only where the death of the party was the subject of the inquiry.*

Dying declarations are not received in an indictment for perjury. Rex v. Mead, 2 B. & C. 608. Nor in an indictment for robbery, Rex v. Lloyd, 4 C. & P. 233, nor in civil cases. But death-bed declarations *in favor* of the prisoner are not received.

In an indictment for murder, the prisoner was not allowed to avail himself of the statements of a stranger, *who on his death bed confessed that he had committed the crime.* Rex v. Gray, Irish Circuit Reports, 76.

But while the dying declarations of the real criminal, confessing his guilt on the verge of eternity, are rejected, those of the deceased will be received, as they may have an influence on the amount of punishment to be inflicted upon his murderer. Rex v. Scaife, 1 M. & R. 551; Moore v. The State, 12 Alabama, 764.

(d) "Multi
Committunt eadem, diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema."
Juv. Sat. xiii. 104-107.

(e) This question, of the admissibility of the declarations of the deceased in civil cases, has frequently arisen, and the testimony has always been excluded. A remarkable case of the tenacity of the common lawyer to decision—of his preference to precedent over reason—of his utter indifference to the consequences of his rules—may be found in Jackson v. Kniffen, 2 Johns. 31; Wilson v. Bowman, 15 Johns. 287; Duncan v. Seaburn, 1 Rice, 27.

should they not be equally effective in civil cases? If there be testimony under oath and interrogated in one case, why not in the other? No assignable difference can be pointed out between these instances, except the greater or lesser interest, pecuniary or other, at stake; and no principle can be found justifying this alternate admission and exclusion, unless it be one based on the position, that the more important are the rights involved, the less material is the trustworthiness of the proofs by which those rights are to be maintained.

In private life they would command belief; in judicial proceedings they are rejected, not because they are not evidentiary, but from a fear lest they will receive too much credit. . . . "This species of proof is an anomaly and contrary to all the rules of evidence. . . . and if received, it would have the greatest weight with the jury."(*f*) Such the description of this kind of evidence by an eminent judge. Were it likely to have less weight, it might perhaps have been received. Has it the greatest weight? If so, whether anomalous or not, why not receive the testimony? If not entitled to weight, why permit the anomaly? Proof contrary to "all the rules of evidence," receiving the greatest weight; is it from the badness of those rules or the imbecility of the judge? Would it have weight without cause? If not, that weight does not, and cannot arise from the fact to be proved, nor from the term by which the process in which it is used may be designated; nor from the legal consequences, which may result.

Pedigree, marriages, births, deaths, &c. "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence; as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property are regulated:(*g*) . . . in cases of pedigree, recourse is had to a secondary sort of evidence: . . . . it is not necessary that this evidence should have the correctness required as to other facts."(*h*)

The common law seems to proceed on the ground that some facts may be proved any how; that to prove one fact important in its bearing, legally competent evidence is required; that to prove another, hearsay, however loose, will suffice. That every alternate link in the chain which binds together facts and rights may be ever so brittle without weakening the strength of the whole.

But descent the question—and the determination of the cause dependent upon its proof, what reason can be assigned why that fact should be substantiated by evidence, which the law considers dangerous in its tendency?

If the impossibility be one arising from the remoteness of time in which the marriage or birth(*i*) upon which the title is founded, took place; the more remote and traditional, the more media through which it has been transmitted, the stronger the objection to the evidence. The very remoteness of these facts, the difficulty of detecting and refuting

(*f*) By Coleridge, J., in Rex v. Spilsbury, 7 C. & P. 187. And therefore was the evidence excluded, for cause, and such a cause!

(*g*) Vowles v. Young, 13 Ves. 149. (*h*) Ibid. 164.

(*i*) Hearsay as to marriage, time of birth, admitted; the hearsay declarations of the mother denying the legitimacy of the child, are excluded. Is she not the best witness? where else can knowledge be obtained? is not the confession against her interest? 2 Brock. C. C. R. 256.

fraud or deception, of unveiling error, increases in proportion to the distance of time from the happening of the event. The evidence is dangerous in the ratio of its antiquity, for in that degree are the means of detection and refutation wanting.

"The whole goes upon that: declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."(*k*)

Here then is no oath, no cross-examination; but knowledge, and the even position of the witness sanction the reception of hearsay. The entries of a witness deceased, provided "there is a total absence of interest in the person making them to pervert the fact, and likewise a competency in him to know it,"(*l*) are received. Without such competency to know, the admission would not be required by any one. But the fact of competency to know must be derived from the witness himself. Knowledge, or a competency to know something about the subject matter of one's testimony, a reason for admission, it applies with the same force to every witness of every fact. If the even position of the witness, by which we suppose is meant absence of interest, be considered a satisfactory reason, it is difficult to perceive why the admission should not be co-extensive with the principle upon which it is founded.

Marriage, births, deaths—upon the proof of which titles to estates of any conceivable magnitude may depend—whatever their relation and importance in the cause, would appear as much to require legal and competent proof as any other facts. Yet, important as they may be, hearsay will answer, except where they are "substantive," "specific," and "particular" facts, in which case hearsay is insufficient. Marriage, the begetting of sons and daughters, their births and deaths—are they not "substantive,"(*m*) "specific"(*n*) and "particular"(*o*) facts. If not

(*k*) Whitelock v. Baker, 13 Ves. 514. Such the reason here, but in Vowles v. Young, 13 Ves. 146, the chancellor there says that "the law resorts to hearsay upon the principle of interest in the person from whom the descent is to be made out, . . . and that it is evidence from the interest of the person in knowing the connections of his family." So that the hearsay declarations of a deceased witness are received, for the same reason, interest, which would have been considered satisfactory for rejecting the witness, if living, and subject to all the securities by which integrity of conduct can be guarded.

"The presumption of accurate knowledge on the part of the speaker . . . rests on the interest, pecuniary and general, which every man must be supposed to have in knowing the connections of his family." Gres. Ev. 227.

(*l*) Doe v. Robson, 15 East, 32. But knowledge in the person from whom the hearsay is derived, is not required; coming through ever so many degrees, it is none the less received, in cases of pedigree. There is no certainty that the rule will be adhered to. Knowledge—even position—will not justify the admission of hearsay as against an archbishop. In 2 Esp. 648, Culvert v. Archbishop of Canterbury, the plaintiff's servant entered the terms of an agreement in which he had no interest, and died; his entries of such agreement were excluded.

(*m*) The declarations of deceased members of a family as to marriage as well as birth and deaths are admitted. "The evidence however of the marriage . . . is but incidental to the proof of pedigree. Where marriage is shown as a *substantive* and independent fact, it is within none of the exceptions to the general rule, and

(*n*) For note (*n*) see next page. (*o*) For note (*o*) see next page.

in one case, how come they to be in another. Marriage, the fact contested, the final fact, it must not be proved by hearsay; a fact prior in time to the final fact, but therefore none the less important, for without marriage, no birth, no heirship, no title to the estate demanded, it may be. The same marriage may be proved in different modes according as its relation in the cause may alter. Prefix only the adjective—let the marriage be a substantive, a particular or specific fact—the admission of hearsay is fraught with inconceivable danger. Remove the adjective, and with its removal all danger passes away.

The claim of the demandant resting on his pedigree, and his pedigree provable only by hearsay, the *status*, the civil condition of the respondent,(*p*) whose liberty is in issue, is attempted to be proved by the same kind of evidence. The marriage of the ancestor, from whom the plaintiff makes out his descent, is not a specific fact—the civil condition of the ancestor of the slave is. Hearsay to aid the master is received—for the protection of the alleged slave refused. The pedigree of the one need not be established by the "strict rules" of the common law—the civil condition of the other must be; as though the lapse of time, by which proof is lost, and which renders a resort to secondary evidence necessary in the one case, would not render it equally so in the other. Birth, death, when not substantive facts, may be proved by hearsay. The freedom of the defendant's ancestor cannot be shown by the same kind of proof by which the demandant's right to the defendant, as a mere chattel, is made out. One rule when the defendant's property, a different one when his liberty, is claimed. Or does the distinction depend on color?

Parentage, birth, and the time of birth proved by hearsay, the question of where born may become important; the place of an undisputed birth may be contested. The principal fact, the birth, the time when, has been proved by hearsay, from necessity, because no better proof could be had. But if no better can be had of the birth or the time when born, no better can be had of the place of birth. If the birth were proved by one present, the same proof would give locality to that birth. Proof of the place of birth implies proof of the birth; for a knowledge of a place, of the place, is nothing, apart from the fact, birth, which happened there. "The controversy was not as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth derived from known and acknowledged parents has happened. The point thus

hearsay evidence cannot be received." By Erving, C. J., Overseers of Westford v. Overseers of Warren, 3 Hals. 250.

(*n*) "Hearsay evidence is incompetent to establish any *specific* fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." By Marshall, C. J., Mina v. Hepburn, 7 Cranch, 290.

Are not all facts constitutive of a pedigree susceptible of being proved by witnesses speaking from their own knowledge?

(*o*) "Hearsay is in like manner evidence to prove general repute in a matter of antiquity, although it would not be competent for proving *particular* facts to establish the same conclusion." Glassford, Ev. 358.

(*p*) Mina v. Hepburn, 7 Cranch, 290. Mr. Dane's account of the law of hearsay is inimitable, for its calm but cutting sarcasm. Referring to Gregory v. Baugh, 4 Rand. 611, 659, he says, "in this case, of forty-eight pages, there is much law and learning respecting hearsay and reputation, as to pedigree; the nature and principles thereof, &c. . . . But, on the whole, the decision in this case is doubtful, especially on the point of hearsay evidence." 9 Dane, 291, 292. A fair sample of what forty-eight pages of law will do, towards inducing certainty.

stated turns on a single fact involving no question but of locality; and therefore not falling within the principle of or governed by the rules applicable to cases of pedigree; and is to be proved therefore as other facts generally are proved, according to the course of the common law; that is by evidence to which the objection of hearsay does not apply."(o) A second Daniel come to judgment. The birth proved by hearsay, because of the impossibility of obtaining living proof, the place where, to be proved by living witnesses, as though a witness could know of the place where the birth happened without knowing of the birth. Birth, the main fact, without which there could be no inquiry,—where born,—place,—a secondary fact of accidental importance; the one to be proved by secondary, the other requiring primary evidence to substantiate it. The law of evidence changes as the question is of time or of place.

The place of birth is not to be proved by hearsay, because it is a mere question of locality. The terminal bounds of an estate,(p) ancient monuments may be, either because they are not local, or because the judge chooses to say they are not local; or, being local, because the judge elects to form a new rule, by which he permits one class of local facts to be proved by hearsay, and refuses that mode of proof to another. The rules of evidence changing, according to the variations of the fact contested, hearsay is received, when the controversy relates to the boundaries of coterminous estates; excluded, when offered to prove the time of birth, or that the will upon which the title of either party rests was obtained by fraud or duress.

But distinctions, arising from the fact to be proved, whether of property or liberty,(q) whether relating to time or to place; if to place, what is the nature of the fact, where an undisputed birth took place, or where a disputed monument was located, whether the fact be substantive or not—idle, futile as they are seen to be, are all merged in the surpassingly ridiculous inquiry, of when made; and the declarations of the same individual in relation to the same fact are admitted or not, as they are before or after a given point of time, which is designated by the term *lis mota*. *Ante litem motam*, "what is thus dropped in conversation, may be presumed to be true. But after a dispute, the presumption in favor of declarations fails."(r) But if true before, why not after? *Ante litem motam*, the relations might have been loose, careless, indefinite, for the simple reason, that then there existed no call whatsoever for particularity or accuracy. But litigation is commenced, then first does the evidence become important—then first is the witness particularly called on to remember—then first are called up by-gone events and conversations. The question is of moment. The statements are made after due

(o) By Lord Ellenborough, Rex v. Erith, 8 East, 542. "The reason is not altogether satisfactory. It is better to uphold the rules of evidence, than to admit testimony of a doubtful character." By the court in Wilmington v. Burlington, 4 Pick. 176. The court says the question of birth-place presents a distinct fact. A distinct fact! What then, are new rules to be formed for each distinct fact?

(p) 2 Am. Com. Law Dig. 294, and cases cited. Gabriel, sur la nature des preuves, § 122, 123.

(q) How true the remark of Thomson, J., in Jackson v. Cooley, 8 Johns. 101, that testimony as to pedigree is not to be tested by the ordinary rules of evidence."

(r) 4 Camp. 416, by Mansfield, C. J. Why are the droppings in conversation more true relating to pedigree than to anything else?

care and reflection—when, and as it is expected they will be substantiated by oath. The witness is summoned to trial, but dies before it takes place. His loose conversational declarations have been received—his deliberate and well advised statements, the result of much reflection, and to which he was ready or declared himself ready to adhere under the solemnities of an oath(*s*)—statements materially varying those already received, are offered to control their effect; but because made *post litem motam*, they are excluded as if the *lis mota* destroyed the truth of hearsay and of no other evidence; and destroyed it so effectually, that the same individual, honest before, is at once thereby corrupted, and that to admit his declarations "would lead to the most dangerous consequences."(*t*)

But dangerous as is the *lis mota*, truth destroying as are its effects, the deceased witness may not have known of its existence. *Lis mota* unknown, it could have had no effect on the mind of the declarant, unless like the miasma, it permeates the atmosphere and infects all within its range. The evidence true, if the *lis mota* were unknown, it is nevertheless shut out as if it were known, because if an inquiry were to be instituted as to that fact, "much time would be wasted, and great confusion would be produced."(*u*) To save the time of the court, to prevent the confusion of their minds, the rights of litigants are to be sacrificed by the random exclusion of testimony, which, for aught that is known, might have been in the highest degree entitled to confidence.

Nor is this all, were the declarations of the witness made under oath, in a cause then pending, subject to cross-examination by the respective parties therein interested, yet the declarations in that form so peculiarly entitled to confidence would be excluded, because as declarations they are *post litem motam*, because as depositions, they are made *alia in causa*, while if made without scrutiny, without oath, by the same individual, in the same words and in relation to the same cause, they would have been received. This was an absurdity so striking, that even lord Eldon admitted, that "it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath not."(*v*)

(*s*) Berkely peerage case, 4 Camp. 401.

(*t*) Berkely peerage case, 4 Camp. 415, by Mansfield, C. J. These declarations are rejected "because of the possibility, nay probability, that they may have been made to serve either of the contending parties." By Wood, B., 4 Camp. 406. But the witness living would not thus serve either party. Standing in an "even position," *ante litem motam*, how or why does the *lis mota* destroy that evenness? The cause of action existing, *lis non mota*, the witness without interest, his situation in that respect unchanged, why or how does the *lis mota* affect the credibility of his statement. Is fraud, fabrication, perjury, the presumptive consequence of litigation—if so, what is to be received?

(*u*) By Mansfield, C. J., in the Berkely peerage case. "The line of distinction" (as to the admission of declarations) "is the origin of the controversy, and not the commencement of the suit. After the controversy has originated, all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced."

The case criminal, of homicide, the accused arrested, the dying declarations of the deceased are received. Is this an instance of *lis mota*, or not? If yea, why are these declarations received, if nay, why not? Is there no *lis mota* in criminal cases? If there be, and if this is not that case, it is difficult to perceive what is.

(*v*) Berkely peerage case, 4 Camp. 419. The petitioner in this case presented a petition praying that he might be summoned to parliament by the title of Earl of

Entries and admissions against interest.(*w*) The admission of entries or statements, verbal or written, against the interest of the party making them at the time when made, is supported by the reasoning upon which confessional testimony is received and credited, the improbability of suicidal *mala fides*, of entries being untrue and adverse to the interest of the party making them, and hence, being made, the probability of their truth. But here too, it will be perceived, as in all other exceptions, the rights of third persons are to be affected by testimony, upon which the same law, which admits it, says no reliance should be placed.

While the propriety of the exception is not contested, it may not be inexpedient to notice briefly some of the cases marshaled under this head by those, who so strenuously deprecate the general rule, and to ascertain what is the character of that opposition to the interest of the person making them, on account of which their reception is justified.

All entries made by stewards(*x*) or others, of payments to them made, and in general all entries in and by which, the payment of a sum, whether in discharge of an antecedent debt, or for and on account of some other individual, in and by which the person so charging himself is rendered the debtor of such other person, are received, as being against the interest of the person so making them. If not against such interest, the inference is, they would not be received. That an admission of the receipt of money would not be made, unless true, is in the highest degree probable, but being true, the money having been received, the acknowledgment of such receipt by making the customary entries, would not be against the interest of the person so receiving, unless it be against an interest founded on a dishonest and fraudulent suppression of such receipt. The fact of such receipt being true may be proved at the time *ab extra;* the concealment of such fact, the absence of such entry, would

Berkely, and as eldest son of the late Earl by Mary, Countess of Berkely. The petitioner was born in 1786, and alleged that the marriage between his parents had been privately celebrated before that time. It was admitted, that in 1796, the marriage had been publicly celebrated, after which they appeared in public as man and wife. The question before a committee of the House of Lords (the matter being referred to them), was as to the reality of the first marriage. In 1799, (see 6 Ves. 251,) a bill to perpetuate testimony in relation to that point had been filed, and the deposition of the then Earl of Berkely had been taken, by which it appears that the first marriage had taken place, and when.

The petitioner claimed that this deposition thus taken should be received to establish his legitimacy. The judges, and chancellors Eldon and Redesdale decided it was not admissible, Graham, B., alone dissenting. To the opinion delivered by the judges, the House of Lords yielded, and the petitioner, who had as good a right to a seat in that house as one of that body, if his father's oath was deserving credit, was denied one.

What makes the case still more remarkable is the fact, that, (says Lord Eldon,) there was no possible way in which the claimant could have availed himself of this testimony. The *lis mota* did not relate to the title. Had the claimant made no efforts by bill to perpetuate testimony, and had he not obtained the testimony in the best mode to protect his rights of property, the hearsay declarations of his father would have been received. Preserving the testimony in the best mode, and under the sanctions of the Lord Chancellor, thus serves as a reason why the secondary evidence, otherwise receivable, should be rejected. That rejected, the evidence taken was excluded, because it was a deposition, *alia in causa*, and *post litem*, and when there neither was nor could be a cause in which it could have been taken for the purpose for which it is offered.

The case is well deserving perusal, as a most remarkable instance of judicial juggling. (*w*) Gresley on Ev. 291, 292. (*x*) Gabriel, Traite des Preuves, § 120.

be against interest as it would lead to detection and disgrace. How then is the making such entry against interest, save on the hypothesis that interest and dishonesty are identical, that the only interest known to or recognized by the law is of a sinister nature. The entry would be against interest only when false, in which case its falsehood would be the reason of its admission to affect the rights of third persons. Being true, it is no otherwise against interest than as fraud and dishonesty are for interest.

Another exception is that of the hearsay statements of the tenant,(*y*) that he is tenant, which are received to affect or control the rights of others on the ground that they are against interest. If the individual asserting his tenancy were tenant, how are such assertions against his interest? His tenancy might have been in contest; if so, the assertion was in support of his interest. It was an interest of greater or less value, but still an interest, sufficient to be the matter of litigation, and it is not very easy to perceive how a statement in support of a claim which is denied is against one's interest. The time when the admission is made, the situation of the party when making it, is to be regarded; and if at that time, the declaration were self-disserving, then so far as that fact affords a valid reason, the admission is justifiable. But that the common law never deigns to do, but receives the admission, when, for aught that appears, it was made in support of an existing and valuable estate.

So entries of charges made are evidence, provided the charges have been paid.(*z*) Such entry being considered against interest, on the presumption, that all interest is sinister, and that had the individual making such entry acted according to the common law notion of interest, he would have received and pocketed the money without passing it to the credit of the person charged. "That the books would be evidence in themselves, as recording this event of births and other similar events, at the several times when they took place, I am by no means prepared to say." "I think the evidence properly admitted on the broad principle on which receivers' books have been admitted; namely, that the entry was in prejudice of the party making it.(*a*) Such is the language of Lord Ellenborough in Higham v. Ridgway, and with the concurrence of the rest of the court.

That the word "paid" would, as against the party charging, be good and sufficient evidence of that fact, may be conceded. But the fact in dispute was the time of birth, and to that issue payment or no payment was irrelevant. Birth,—the time when,—is the question contested, and the entry of the time when is the only entry judicially important. The charge, stating the time of the event in dispute was one in favor of the person making it. It may be admitted, that the entry of "paid" was against the party making it, but that entry proves nothing. Suppose the word "paid" be taken with the "context," why should the admission of the context depend on payment or non-payment. The entry

(*y*) 1 Phil. Ev. 197.

(*z*) Higham v. Ridgway, 10 East, 109. "An entry made by a man mid-wife in a book, of having delivered a woman of a child on a certain day, referring to his ledger, in which he had a charge for his attendance, which was marked paid, is evidence upon an issue as to the age of the child, at the time of his afterwards suffering a recovery." The decision here is grounded on the fact of payment.

(*a*) 10 East, 120. See remarks of Lord Ellenborough.

received, and effective, is one in support of the interest of the party making it, and its reception is placed not on the absence of interest in the party making it, not on his peculiar means of knowledge, but on the utterly immaterial fact of subsequent payment. But what peculiar trustworthiness does subsequent payment give to the original entry? If never paid, would it not have been entitled to equal confidence? If paid, evidence; if not paid, or if being paid, the entry is omitted, it ceases to be evidence. A new rule established, the same entries are evidence or not, according to the punctuality of the individuals with whom the dealings are had; if with paying customers, it is admitted; if with non-paying, it is excluded. The credibility of the testimony is thus dependent not on the character of the person making the entry, not on the appearance of his book, but on his having been paid by the person for whom the act was done.(*b*)

Hearsay declarations are received because they are in support(*c*) and in prejudice(*d*) of the interests of the individual making them, and because they neither serve nor disserve(*e*) such person's interest. These reasons satisfactory, what instance can be conceived, which is not within their scope?

While hearsay, through ever so many *media*, (and the more numerous the *media* of transmission the less the probative force of the evidence transmitted,) is received, let it primarily and originally have been delivered under the most effectual securities for testimonial veracity, and its rejection is inevitable. In questions of pedigree, the declarations of deceased persons, related to or connected by marriage with the family, are receivable in evidence.(*f*) Let them be dying declarations,(*g*) or, the deliberate answer(*h*) under oath of a father asserting the legitimacy of his son, and notwithstanding the sanctions for truth afforded by the prospect of immediate dissolution, or by the oath administered and the penalty attached to its violation, they cease to be evidence. The weaker the reasons for, the greater the certainty of the rejection of testimony.

Depositions, &c. "Depositions of witnesses, though made under the sanctions of an oath, are not, in general, evidence to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called upon and had the opportunity to do so; for otherwise one of the great and ordinary tests of truth would be wanting."(*i*)

(*b*) Suppose they be paid by services in offset, and not credited, or that the credits are sufficient to pay a part only of the charge, would the books, in which these entries are made, be admissible?

(*c*) Gresley, 227. (*d*) 1 Stark. Ev. 319. (*e*) 13 Ves. 154.

(*f*) In Doe v. Randall, 2 M. & P. 20, it was held that the declarations of a person connected by marriage, were receivable in cases of pedigree. So the declarations of the husband of one of the family. Doe v. Harvey, 1 B. & M. 297.

(*g*) In the proof of a pedigree, the dying declarations of A. as to the relationship of the lessor of the plaintiff to the person last seized, are not admissible. Doe v. Ridgway, 4 B. & A. 53.

(*h*) Berkely peerage case, 4 Camp. 401.

(*i*) 1 Stark. Ev. 261. Sometimes received, as to prove pedigree, but no other fact. Bondenan v. Montgomery, 4 Wash. C. C. R. 186. The question is the fact to be proved, not the principle of admission. The admission of depositions, and judgments of courts, &c., is a question of much importance, and the rules in relation thereto deserve a more searching examination, than we have been able to bestow.

One would be wanting, but only one. In the exceptions already considered, the courts of common law, for such reasons as to them seemed sufficient, have dispensed with cross-examination and abandoned the security of an oath.

The testimony here to be considered, depositions, taken in other causes, between other parties, before different or the same tribunals, and for similar or different purposes, possess few of the characteristic disqualifications of hearsay. The evidence is taken with the sanction of an oath, with all the guaranties thrown around testimony by the law. The statements made, deliberate, guarded, reduced to writing, signed by the witness, leave no room for misapprehension, or misrecollection of his memory. The evidence is delivered not casually, but for a different purpose; reported not by some accidental and indifferent auditor, but preserved in its original shape, it reports itself.

In this testimony, the important element of cross-examination by the party to be affected by the evidence, is wanting. It was taken to subserve other and perhaps opposing interests. But notwithstanding this, it is free from the errors of misconception, misrecollection, and misnarration, to which all other cases of hearsay are exposed.

The depositions taken in one cause are offered for judicial use, under some one of the following circumstances:

1. The deposition was taken in another cause in which neither party to the suit, to which it is to be transferred, was present or interested, and where of course there was neither examination nor cross-examination by them or by any one representing their interests.

It is, then, as to each of the parties, judicially delivered testimony, authentic, trustworthy to the facts therein related, though uninterrogated. The danger is not of falsehood in what is related, for it is all delivered under all the securities of testimony, but of incompleteness and incorrectness, the peculiar dangers of hearsay.

2. Offered by the party who was present at their caption. The dangers here are of one-sided and unfair cross-examination. But that danger seen, the mode and extent of such examination perceived, this case presents comparatively satisfactory reason for exclusion.

3. The deposition offered by one not present, nor a party, against one who was both present and a party.

Here the reasons arising from inability to cross-examine no longer apply. The party being present had full power to examine on such subjects as he should choose.

A stranger "cannot use them against a party, because he could not have been prejudiced by them, and, therefore, for want of mutuality, ought not to take advantage of them."(*g*)

It assumes the correctness of the first exclusion, and upon that assumption, bases the propriety of the second; because one cannot use the testimony, the other shall not. Though it were conceded, that in the first case they could not be used; the inference, that therefore they should not be used in the second, by no means follows.

By the laws of the United States and of Maine, depositions taken in other States, without notice and without cross-examination, are yet received.

(*g*) Stark. Ev. 265; Welles v. Fish, 2 Pick. 77.

Mutuality a reason for the admission of proof. Is all testimony mutual? Must the plaintiff offer none except such as the plaintiff might use? The plaintiff offers the declarations of the defendant. The defendant is not allowed to offer his own, yet who ever heard of the want of mutuality as a reason for their exclusion? That no one should gain by the throw of a die, unless he were to be prejudiced by the same throw, if adverse, is sufficiently clear; but there appears no very good reason for incorporating the laws of the gaming table with those of the courts, or forming rules of evidence analogically in accordance therewith.

Reputation, custom, ancient facts, &c.(*h*) While, as in the cases just examined, hearsay but one step removed from the percipient witness, hearsay under oath or on the bed of death has been excluded; in another class of cases, and as if for the very object of making more strikingly apparent the incongruities of the law, ancient facts, passing through ever so many succeeding lips, coming from nobody knows whom, and originating nobody knows how, are received, and form the subject matter of judicial proof.

One thing is certain, that the more media through which any fact has been transmitted, the greater the dangers of deception. In these cases, who or what was the original witness, when he lived, to whom he first narrated his extrajudicial testimony, through how many media it has passed to the narrating witness—the character, quality, trustworthiness of the original source and of each intervening narrating witness, their means of knowledge, their integrity—all, that it is desirable to know, in relation to it, is enveloped in darkness; but, for all that, it is unhesitatingly received, as if the more ancient a fact the less material was the trustworthiness of the evidence, by which it is to be established; as if old facts required less proof than recent ones.

The ground here taken is not that hearsay through ever so many media may not be properly receivable, but that the propriety of its reception depends not on the antiquity of the fact thereby to be proved, but on the impossibility of proof from other sources; and when no other proof can be had, it is as properly admissible in more recent as in ancient events.(*i*)

Thus much for the law of hearsay,(*k*) where

> "Chaos umpire sits,
> "And by decision more embroils the fray,
> "By which he reigns."

(*h*) Gresley, Ev. 219; 1 Phil. Ev. 204; 2 Am. Com. Law, 494.

(*i*) Si l'on admet le témoignage *de auditu alieno*, a l'egard des faits anciens, qui excedent l'âge et la mémoire des hommes, les auteurs exigent neánmoins plusieurs conditions pour donner de la force a ce témoignage: et en faut quatre.

1. Que le temoin qui dépose d'un fait ancien, l'áit appris de personnes presentes, et qui l'ont vus elle-mêmes:

2. Que le temoin nomme les personnes que le lui ont appris:

3. Que ces personnes soient dignes de foi, et qu'il y en ait plusieurs: au moins deux:

4. Il faut qu'il ait impossibilite de les entendre elles-mêmes en témoignage.

Avec ces conditions cette preuve ne présenté point d' inconvenients, et elle est nécessaire; mais il fáut surtout qu'elle soit soutenue *par la possession actuelle.* 9 Toullier, § 255.

(*k*) "Res gesta," what it is, or is not, the decisions of courts in relation thereto, and a comparison of those decisions with other branches of the law—presents a subject of much interest, but to which the length of this chapter forbids more than an allusion.

CHAPTER XIII.

EXAMINATION OF WITNESSES AT COMMON LAW.

It has been seen, that neither want nor defect of, nor error in religious belief, nor infamy of character, nor pecuniary interest in the result of a cause, nor position in the same as plaintiff or defendant, nor relationship to the parties by consanguinity or affinity, afford any sufficient reason for the exclusion of witnesses; and that no communication, whether professional or otherwise, however sacred as between the parties, is privileged from disclosure when required for the purposes of justice.

The present inquiry relates solely to the best mode of extracting evidence at common law,—to the surest method of obtaining from the witness, whether extraneous or a party to the cause, whether honest or dishonest, whether friendly, hostile, or indifferent to the person calling him, the facts as they exist, with the single purpose of promoting or securing correct decision. The most efficient and reliable mode of extraction, whatever it may be, is equally the best and most reliable, whether it be to extract testimony from a witness willing or reluctant, before a jury or a chancellor, at common law, in equity, or in admiralty. Whatever mode is most efficient in one case, is equally so in another,—in all cases. It is equally desirable that a juryman, as well as a chancellor, should have the evidence upon which he may be called to act, correct and complete. Is it important that a juryman should have the evidence extracted in the most trustworthy shape?—it is none the less so for the chancellor or the judge in admiralty. No matter, then, what the relation, the person whose testimony is to be extracted, may sustain to the cause in which it may be needed; nor what the character of the cause, whether civil or criminal, whether at common law, in equity or in admiralty; nor what the process or proceedings, whether by suit, information, indictment, bill, or libel; nor whether the court in which the proceedings may be pending be a court of common law, equity, or admiralty; nor what the stage of the proceedings, whether preliminary, intermediate, or final; that mode of extracting evidence, which reduces to the minimum the dangers of falsehood and increases to the maximum the probability of truth, which affords the readiest and surest ways of diminishing or removing the dangers of incorrectness or incompleteness, should be adopted; unless and except when the expense, delay, and vexation consequent upon adopting the best mode, overbalance and exceed its benefits,—when the collateral evil exceeds the direct good,—in which case only resort may be had to a less effective mode of extraction.

Whether existing and attainable proof is shut out by reason of exclusionary rules as to the witnesses, from whom it might have been had, and who are not permitted to testify, or it is not made available and forthcoming in consequence of an inefficient mode of extraction, the results to the cause of justice are the same. The means for a just decision are wanting, and misdecision must inevitably ensue. A failure in extracting existing evidence is as disastrous as its exclusion. A defect in the mode of extraction may be as injurious as the most perverse exclusionary rules. Important, then, as are the rules regulating the admission of evidence, hardly less so are those by which it is extracted.

The correctness and completeness of testimony are the objects to be desired. Incomplete in detail, to the extent of such incompleteness it fails to present a true picture of facts as they occurred. If incorrect in generals or particulars, to the extent of such incorrectness there is a variance from truth,—fatal, it may be, to the cause of justice. It is not enough that the testimony be correct, as far as given, if incomplete. Either incorrectness or incompleteness, equally with intentional mendacity, may lead to misdecision.

The leading modes of extracting testimony are those employed at common law and in equity,—modes utterly at variance with each other, and each modified by further variations in admiralty. Common law has its different ways of extracting, conflicting with each other, and variant from those in equity or admiralty. Equity has its different modes of extracting proof. Each in its own administration of the law is inconsistent with itself and in conflict with others.

The differing processes of extraction adopted by the different courts, or by the same court on the different occasions in which testimony may be required, would seem to afford satisfactory proof that there must be error in some of the modes in use. This conflicting variety suggests the obvious idea that there must be divers degrees of excellence and adaptation to the ends of justice, and that the best mode, whatever it may be, should be adopted as the general course of procedure.

In the ordinary narration of events by the fireside, it rarely happens that all the facts and circumstances accompanying the transaction narrated, are so fully and particularly related as not to require further interrogation on the part of those who may be auditors of the narration. Interrogation affords the only natural, obvious and indispensable means for the attainment of that correctness and completeness so requisite in the testimony of a witness, and so necessary for the judge, for the purposes of correct decision. If you wish to ascertain the truth, inquire. If you wish to know, ask. Without the opportunity of inquiry, you are at the mercy of the narrator.

In judicial proceedings, the importance and necessity of interrogation is then unmistakeably apparent. Grave results, important rights, are determined by the evidence received, and the just decision of those rights is dependent upon the correctness and completeness of the statement of the facts to which the witnesses may attest.

The witness, honest and indifferent as between the parties litigant, may be ignorant as to what are the material facts in a cause, and from

indifference may omit what is important. Ignorant alike of the material and the immaterial, the relevant and the irrelevant, he may disclose the immaterial and the irrelevant, and suppress the material and relevant, disregarding or misapprehending the relative importance of the facts within his knowledge. He may err by omission, indistinctness, or incompleteness. Whatever the cause of the error, whether indistinctness, incompleteness, or incorrectness, interrogation is the only sure and recognized remedy for the correction of any such errors, however originating.

Is the witness dishonest and adverse to the party interrogating, the necessity of interrogation, as a means of extracting the truth, is at once perceived, and its value indefinitely increased. By this, self-protection is readily obtained. Is the witness indistinct, the needed inquiries remove indistinctness. Is he incomplete, interrogation is the natural and obvious mode of obtaining the desired fulness and completeness of detail. Is he incorrect, suitable questions are proposed to rectify incorrectness when existing. Searching interrogatories pursue the dishonest and reluctant witness through the mists of indistinctness, the errors of incorrectness, the omissions of incompleteness, the evasions of dishonesty, or the falsehoods of intentional mendacity. Does he answer truly? The true answers at once furnish the means of correct decision. Does he answer evasively? Question follows question, till the lying witness, driven from one evasion to another, either confesses the truth or resorts to silence, a hardly less explicit admission of the truth. Does he answer falsely? Each false answer, each untruth uttered, at variance from, in opposition to, or in conflict with the truth, exposes him to contradiction by the true facts disclosed, and by its very falsehood furnishes an article of circumstantial evidence of no ordinary probative force. Does he refuse to answer? Silence is equivalent to confession. *Habes reum confitentem.* The refusal to answer, the evasive, the false answer, the not less significant and expressive silence, are each circumstances of no slight force in their effect upon the minds of those who may be called upon to decide.

Is the witness honest and friendly to the party interrogating, the completeness and particularity of his answers will somewhat depend upon the interrogations in and by which they have been extracted. The party interrogating cannot be expected, by his inquiries, to seek for answers other than such as will favor him—as will tend to establish the facts as he claims them to exist. He will answer only the questions proposed, and the answers to the one-sided interrogation of the party calling, will, to an extent more or less limited, be incomplete and partial—the natural and inevitable consequence of the incomplete and partial inquiries proposed.

Even if there be entire integrity on the part of the witness, and complete indifference to the parties litigant, the necessity of cross-examination is apparent, for without it facts adverse to the party calling may be withheld. The attainment of correct decision will be endangered unless the right of interrogation, in its fullest extent, be conceded to both parties, to enable them to elicit such facts as from inadvertence, want of memory, inattention, or sinister bias, may have been omitted.

All persons interested in ascertaining the truth, and whose rights

may be affected by its ascertainment in any particular case, should be permitted to propose all relevant and pertinent inquiries. The parties, the counsel who aid them, the jury who are to decide, the judge who presides over the trial, should have full liberty of interrogation, for the elucidation of the facts and the ascertainment of the truth.

But there can be no useful nor effective interrogation, except when the testimony is orally delivered, and in the presence of those who are to interrogate.(*a*) No interrogatories, however general, can anticipate the answers which have been given to preceding inquiries. The interrogator may travel over the illimitable regions of the imagination, and guess in vain the words which have been given by way of answer, when the inquiries have been proposed to an absent witness. If, indeed, all supposable questions are put to meet all unknown and contingent answers, the only limit to the inquiry is the greater or a lesser fertility of imagination of the person inquiring. The time, delay, expense, and vexation of thus darkly groping after the truth, are only avoided by requiring the presence of the witness before the individual or individuals upon whom the power of interrogation is conferred.

Whether the witness be honest or dishonest, friendly, hostile, or indifferent, to one or both of the parties, of clear perceptions or of weak understanding, it matters not. The facts can only be extracted by interrogation.

If the witness be dishonest, the instant question follows the answer. Invention is the result of labor, of thought, of premeditation. The only opportunity afforded for invention is the brief interval between the question and the answer consequent thereupon. The witness can never foreknow the interrogatories which may be propounded. The direction, tendency, nature, or purpose of the unknown interrogation, he cannot foresee. Not foreknowing, not foreseeing, though ever so mendacious in intent, no time for invention is allowed.(*b*)

Indistinctness is one of the great defects of testimony, whether caused by a design to evade, and therefore indicative of dishonesty, or through want of clearness of perception, and therefore evidentiary of want of intelligence. Interrogation furnishes the obvious remedy for its removal.

(*a*) By the French law in criminal cases, witnesses are examined publicly, in presence of the judge, but not in civil cases. "Dans les matières criminelles, aux assises, au tribunal de police correctionelle, ou même de simple police, enfin, dans les matières sommaires portées aux tribunaux civils, les témoins sont entendus à l'audience en présence des juges et du public." * *

Mais, dans les matières civiles ordinaires, les témoins ne sont entendus à l'audience; leur déposition est reçue par un commissaire accompagné de son greffier; les parties, et leurs avoués peuvent, à la vérite, y assister; ils peuvent proposer des reproches sur lesquels le témoin est tenu de s'expliquer. * *

Les reproches, les explications, les interpellations, et les réponses, sont consignées dans le procès verbal du commissaire, qui rédige les dépositions et les fait écrire par son greffier; elles sont ensuite lues à l'audience du tribunal, mais sans appeler les témoins pour expliquer ce que peut s'y trouver d'obscur, d'équivoque, ou de contradictoire. 9 Toullier, § 324.

(*b*) L'ordinance et le code exigent qu'il soit donné copie des faits et articles sur les quels la partie doit être interrogée, et au moins vingt-quatre heures auparavant, suivant le code de procédure comme pour lui donner le temps de méditer ses résponses, et de les préparer avec plus d'art. 10 Toullier, § 276.

The indistinct answer occasions the demand for a new inquiry to remove the indistinctness, and the party interrogating being present, it is at once perceived whether the object in view has been attained.

Interrogation and cross-interrogation, the questioning of witnesses by all interested in the result, the inquiring by those who know what information is needed, are the only effective modes of eliciting the facts,—important, if the witness be friendly, to remove uncertainty and indistinctness, and to give fulness and clearness,—doubly important if the witness be dishonest and adverse, to extract from unwilling lips facts concealed from sympathy, secreted from interest, or withheld from dishonesty. The delays to answer, the withholdings, the reticence, the evasions, the innumerable indications of reluctance to answer, or of knavery, on the part of the witness, can only be detected and exposed by public examination and cross-examination.

All the securities for trustworthiness in testimony are found in their highest efficiency on a trial of a cause at common law before a jury. The zeal, interest, and knowledge of the party, the instructed sagacity of counsel, the experienced skill of the judge, the calm sense and cool judgment of the jury, furnish the best guaranties that incorrectness and incompleteness will be removed, falsehood detected, and truth established.

The witness present, the promptness and unpremeditatedness of his answers, or the reverse,—their distinctness and particularity, or the want of these essentials,—their incorrectness in generals or particulars,—their directness or evasiveness, are soon detected by those who extract the evidence, and by those who are to determine upon its force and effect. The appearance and manner,—the voice,—the gestures,—the readiness and promptness of the answers,—the evasions,—the reluctance,—the silence,—the contumacious silence,—the contradictions,—the explanations,—the intelligence, or the want of intelligence, of the witness,—the passions, which move or control,—fear, love, hate, envy, revenge,—are all open to observation, noted and weighed by the jury. The answers ready?—is this readiness the simple and spontaneous utterance of truth, the language of nature, the response correspondent to the facts, or the deliberately prepared answers of determined mendacity? The answer prompt?—is it the promptness of self-sustaining integrity, or the impudent audacity of hardened guilt? The answer evasive?—is it the evasion of cowardice, the reluctant response of self-conscious crime, or the diffidence of innocence, distrustful and anxious from its unwonted position?

The answers given, there is no intervention of the transcriber with his possible errors of inattention of misunderstanding, or of design. There is no language of the scribe, with the unavoidable variations of words or ideas from those of the witness testifying. The tribunal which decides, is the tribunal which hears. If the meaning of the witness is doubtful, the doubt is at once removed. If there be any misunderstanding, the means of correction are at hand.

The mode of extracting testimony before a jury in trials at common law, may be regarded as the most perfect, as attended with the least

danger to the cause of justice, and as affording the greatest securities for correct decision.

The extraction of evidence in the presence of the parties, the judge and the jury, with full liberty of examination and cross-examination, being recognized as the mode best fitted for eliciting the truth from all witnesses, willing or unwilling, most instructive to the jury and most conducive to the purposes of justice, nothing but a regard to its collateral ends can ever authorize or excuse a deviation therefrom.

In opposition to, and in direct contrast with this best and most effective, is the worst and most defective mode of proof by way of interrogated and spontaneously delivered testimony, prepared and offered by the party, with the aid and co-operation of counsel, which obtains to such an extent in common law procedure. Affidavits cautiously and deliberately prepared, carefully worded, vague when particularity is desirable, particular and specific when unimportant, evasive when certainty is demanded, certain as to the immaterials, suggesting or implying falsehood, not uttering it, concealing the truth, giving special and peculiar prominence to all facts important to the affiant, withholding all adverse or injurious, without cross-examination, with no opportunity for contradiction, present the evidence in the most deceptitious and untrustworthy form, yet they are the bases specially selected for judicial action in most if not in all cases which are submitted to the determination of the judge alone.(*c*)

In the progress of a cause, there arise, not unfrequently, causes within a cause, trials preparatory to or during the final trial;—each important in itself, each important in its bearing upon the result of the cause in which they occur;—trials to determine the loss of a paper for the purpose of admitting secondary evidence, to procure the continuance by reason of the absence of material testimony, and a variety of similar questions, which are to be heard and determined by a single judge.

Now correct decision is desirable, no matter what the question to be decided, nor what the stage of the proceedings in which the decision is to be made, whether primary, intermediate, or final. But correct decision can only be expected upon evidence, and evidence for whatsoever purpose required, should be extracted in the most efficient manner. The truth is none the less needed or important, because the decision, based upon the proofs received, is to be made by a judge and not by a jury, because made at an early rather than at a late day of the cause. The judge, who is to decide, none the less requires the truth when the proof is for his own use, than when for that of a jury.

But in the variety of questions presented for judicial determination, the judge acts mainly if not entirely upon evidence in the shape of affidavits. The statements of a party reduced to writing by counsel, are received, though the witness is present in court, ready for interrogation, though never to be interrogated. The studied phraseology of counsel, adroitly worded to conceal the truth, elaborately suggesting falsehood, is received and acted upon without inquiry. The opposing party can neither ex-

(*c*) See the remarks of the court on this subject in Johnston v. Todd, 5 Beavan, 597.

amine the witness, nor contradict nor disprove his testimony; unquestioned, uncontradicted, it passes for verity itself.

Nor is this all; jealous as the law is of the sinister effect of interest, or of the position of a party upon the truth of testimony, this most inefficient and unreliable mode of extraction is resorted to, when, if ever, all attainable securities for veracity are demanded. Position in a cause as that of a party cannot be expected to exist without giving the favorable coloring of self-interest to the testimony. The more apparent this, the more needed the securities of publicity and adverse examination; securities the most efficient for detecting or preventing falsehood, designed or undesigned, of deliberation or inadvertence. The common law denying testimonial veracity to parties or interested witnesses, and excluding them for that cause, when both grounds of exclusion co-exist in one and the same person, receives his testimony only on condition that all the recognized securities for trustworthiness are abandoned, and that the dangers of deception shall be the greatest. When the witness knows there is to be no subsequent adverse interrogation, then, if ever, there is most to be feared from uninterrogated testimony.

Examination, friendly or adverse, before a jury, being and being seen to be indispensable for the purpose of developing the truth, why should it not be so before the judge? The party, the affiant, present, there is no delay, no increased expense; why, then, when the case is before the court, this sinister sympathy for the worst, and this perverse antipathy to the best mode of eliciting testimony? Why not abolish this inefficient and deceptive mode of proof, and resort to the party present, and let him be examined and cross-examined, as on trials before a jury? Why, with the best mode of extracting the truth so obvious, without reason or necessity resort to the worst?

The witness to be examined, the right on the part of all to whom interrogation is intrusted, to propose all pertinent, material, and necessary inquiries, would seem to be unquestionable. But such is not the law. Restrictions and limitations for various reasons, and in different directions, are imposed upon this right, the expediency of which we propose to consider.

In most cases the witness is the fortuitous, not the selected and preappointed observer of the facts, to which his testimony relates. This is peculiarly so in criminal cases. Rarely is the selection of witnesses made in advance. The lawsuit is not anticipated. Litigation is not expected. If foreseen, the contract in which it originated would not have been made, for contracts are made with the expectation of their voluntary performance on the part of those contracting, not of their enforced performance through and consequent upon a judicial contest. If the crime was foreseen at the time and place of its commission, the effort of the law would be to prevent rather than to permit and then punish. Most crimes are accidental, the result of sudden impulse, unexpected, and the witnesses by whom they are proved, are neither called, nor selected, nor present, for any purpose of witnessing and testifying to the facts. Whether it be the making or the breaking of a contract the commission or the attempted commission of a crime, whether the facts tend to charge or ex-

onerate, the witnesses called are ordinarily those happening, not those specially selected to be present. Witnesses, therefore, should be regarded,—not as belonging to the one side or the other, but as the witnesses of the law, as witnesses of the truth, indifferent to the parties. Yet from a loose use of language, the witness has come to be regarded as the witness of the party calling him, and rules as to his examination, cross-examination, and impeachment, have been established, resting for their foundation upon a sort of possessory right each party is supposed to have in and to all witnesses called by him, and upon an imaginary bias each witness has in favor of the party calling him.

The reasons of the rules upon this subject are thus stated by Greenleaf,(*d*) in his work on Evidence: "When a party offers a witness in proof in his cause, he thereby, in general, *represents him as worthy of belief.* He is presumed to know the character of the witnesses he adduces; and having thus presented them to the court, the law *will not permit the party* afterwards to *impeach their general reputation* for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to *destroy the witness if he spoke* against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him."

What is wanted is the truth *in regard to* a witness, the truth *from* a witness. It is equally desirable that the truth concerning a witness be had, whether it be offered by the party calling him or by his opponent; that the truth be extracted from a witness, whether the adverse interrogation be by the party first examining him or not. Testimony impeaching or contradicting a witness, is equally relevant to the issue, equally important as affecting his trustworthiness whether produced by the one party or the other.

A witness may be impeached in various ways by the party against whom he is called. The right of impeachment is regarded as indispensable for the purposes of justice. Impeached by the party calling him, a witness cannot be. Why not, if his character be bad or his testimony be false? If his testimony vary from the truth, the party against whom he is called may impeach or contradict the witness. The necessity of this course is obvious. But is the necessity less apparent for the purposes of justice, because it is offered by the party by whom the witness was called?

The truth or falsehood, the materiality or immateriality, the relevancy or irrelevancy of this testimony, is not the ground of its exclusion. Its admission or its rejection depends upon no such reasons, but upon the *person* offering it, and his relation to the suit. The party calling a witness, expecting the testimony favorable to his interests,—such testimony being true,—and being disappointed,—expecting truth and finding untruth,—is precluded from showing the character or the falsehood of his witness, because he has called *him*, while testimony of this description is open to his antagonist.

If a party could choose his own witnesses, the rule would be less ob-

(*d*) 1 Greenleaf on Evidence, § 442.

jectionable. But no such selection is left to him. To rely on the testimony of the witness who alone is present, and has the knowledge of facts, the proof of which is indispensable, is a necessity imposed upon a party by the emergencies of his condition.

The evidence is excluded because the party offering the witness thereby "represents him as worthy of belief." Suppose he does, and it turns out that he was mistaken, is that any reason for excluding proof of his unworthiness? Is it not rather the very reason of all others for its reception? It is required because the witness has lied, and shall the lie be triumphant because the liar was called by one party and not by the other? Shall one party be permitted to show the truth and the other be precluded? If it be proper to impeach one witness, why not another? Witnesses are called and sworn to testify truly. If they do not, the party against whom they are called may impeach their character. Because the party calling has been deceived, is that a reason why the jury should be misled, and that a falsehood should be imposed upon them as and for the truth? The ascertainment of the truth is or should be the object of all judicial tribunals, and if evidence of this description is useful for that end, when called by one person, it can be none the less so when called by another.

The party calling a witness is not allowed to call testimony to impeach his general character because "this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, *with the means in his hands of destroying his credit if he spoke against him!*" If the witness testify untruly, why should he not be destroyed? Why give to false testimony the force and effect of true? He could "make him a good witness if he spoke for him." How so? How could he make a bad witness a good one? Evidence as to the "general reputation for truth" of a witness, is not a matter exclusively in the hands of one party, to be used or rejected, as he may choose. This sort of proof is equally open to the other side. The party calling, has no such *lien* on this species of evidence, that he can, at his option, keep it out of the reach of his opponent. The reason given assumes that the party calling a witness, who fails him, shall not be permitted to call the same kind of testimony which his opponent may offer, because it would give him an undue advantage. But by the hypothesis upon which the exclusion rests, there can be no undue advantage since this evidence is known and accessible to all.

Neither, it seems, can a witness be impeached by means of inquiries proposed by the party by whom he was summoned "although he shows a disposition to conceal what he knows," and may deny facts, to the existence of which he has previously sworn, because it would tend "to disparage the witness and show him unworthy of credit with the jury."(e)

(e) A witness, who has testified in chief that he does not know certain facts, cannot, although he shows a disposition to conceal what he knows, be asked by the party calling him whether he did, on a former occasion, before the grand jury, swear to his knowledge of those facts. Com. v. Welsh, 5 Gray, 533.

"It could only be to disparage the witness," remarks Shaw, C. J., "and show him unworthy of credit with the jury, which is inadmissible."

In England, it seems that when a witness gives evidence against the party call-

But why should not a witness be disparaged, whose testimony deserves disparaging? Why should not a witness be shown unworthy of credit, who, having sworn to certain facts, now denies their existence? Why, if such be the case, should an inquiry, for the purpose of proving it from the lips of the recusant witness be forbidden? What reason can be assigned for permitting such a witness to retain a character for integrity, when his want of it may be made so conspicuous? Is the party so in fault for calling a witness to prove facts, to which he has previously testified, that he shall be prevented from showing the truth? Why should he be punished by the loss of a just cause, because a dishonest witness may have deceived him? For what purpose courts? For what juries? To determine the truth of controverted facts. All relevant interrogatories, by whom and to whom soever proposed, having that object in view, should be allowed.

So, too, the party cannot impeach his own witness by proof of contradictory statements made elsewhere. "The witness," remarks the court, in a case where this question arose, "was the defendant's own witness, not called of necessity as an attesting witness, but freely at the party's own option. By offering her, he offers her as a person entitled to belief, and therefore is not allowed to go into proof merely to discredit her."(*f*) But the urgency for the proof may be as great when the witness is *not* as when he is an attesting witness. The necessity for calling a witness may be more or less stringent; but all are called because regarded as necessary. If not so regarded, their presence would not be required. The attesting witness is called "freely at the parties' own option," as are all other witnesses, though in each case the failure to call may be followed by the loss of the cause; but the freedom of calling is the same in each.

The witness offered, may be offered "as a person entitled to belief." But if the party offering be mistaken, why should not his mistake be corrected? That different testimony was expected, is satisfactorily proved by the fact that the witness was called. If there was deception or fraud, why should the party be mulcted by the loss of his cause, because he may have been deceived? Why should a person not "entitled to belief" have the credit of one thus entitled? Does justice require that falsehood should be credited and truth rejected?

But it is said this testimony "is not competent, because *not under oath* and because the party against whom it operates, has no *power to cross-examine the party making it.*"

ing him, he may be asked whether he has not given a different account of the matter in question before the trial; but if the witness denies it, the person to whom he gave the account cannot be called to contradict it. Per Patterson and Coleridge, J. J. Mellnish v. Collier, 14 Jur. 621.

(*f*) Com. v. Starkweather, 10 Cush. 60.

"Evidence that contradictory statements have been made by a witness, is only allowable with a view to his impeachment, a ground not open to the party producing the witness. The answer to an offer like that from such a party, should be given in the words of Mr. Justice Patterson, in a similar case: "He is *your* witness, and *you* must treat him as such." Regina v. Farr, 8 C. & P. 768. Per Beardsley, C. J., in People v. Safford, 5 Denio, 113. S. P. Thompson v. Blanchard, 4 Coms. 311. Hunt v. Fish, 4 Barb. 331.

But this reasoning, if valid, would equally exclude the evidence in question, when produced by the party against whom the witness was called, as when offered by the party calling him. In neither case are the statements offered by way of contradiction, made "under oath." While in each case the witness, the person making them, may be examined and cross-examined by the respective parties to the suit.(*g*)

But to these rules it seems there are exceptions. "For when the witness is not of the parties' own selection, but is one whom *the law obliges him to call*, such as the subscribing witness to a deed or a will, and the like; here he *can hardly be considered as the witness* of the party calling him,"(*h*) and he may be impeached by proof that his reputation for truth is bad, or by contradictory statements.(*i*) Because the law obliges the party to call a witness, is that a reason why there should be a change in the mode of his examination, or as to the extent to which his testimony may be impeached?(*k*) All material and necessary witnesses must be called, if a party would hope to succeed, whether attesting witnesses or not. They are called, because without their testimony the party must fail. Some the law regards as *his* witnesses; such may lie without contradiction or impeachment by him. Some "can hardly be considered" as his witnesses, though called by him, and of such truth is required, and if not obtained, the party calling has the fullest license of impeachment and contradiction. But why this distinction? The necessity which requires the attesting witness is the same as that which requires any other witness, who alone may know material and important facts. The necessity arising from want of other proof, is one in no way affecting the rules of evidence as applicable to the witnesses called.

So, too, "the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony in direct contradiction to what such witness may have testified," notwithstanding "the evidence may *collaterally* have the effect of showing that he was generally unworthy of belief."(*l*) But if the untrustworthiness of a witness may be shown collaterally, why not directly? Is not a collateral impeachment of *one's* own witness as much an impeachment as when it is direct? Is not its effect upon his testimony the same in one case as in the other?

(*g*) 10 Cush. 60.

(*h*) In England, under the common law procedure act 1854, (17 & 18 Vict. c. 125, § 22,) the party in civil cases may, under certain conditions, contradict by other evidence the statement of a witness who has proved, unexpectedly, adverse to the party calling him. The 2d section enacts "that a party producing a witness * * may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him *by other evidence*, or by leave of the judge, prove that he has *made, at other times, a statement inconsistent with his present testimony;* but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such a statement."

This extends to civil cases in England and Ireland, by § 103, but not to criminal courts. But it seems the witness may be interrogated about his contradictory statements. Powell on Evidence, 380.

(*i*) 1 Greenleaf, Evidence, § 443.

(*k*) Dennet v. Dow, 17 Maine, 19.

(*l*) 4 Coms. 311.

The rule that you shall not lead your own, but may your opponent's witness,(*m*) rests upon a presumed partiality on the part of the witness in favor of the party calling him, a partiality so great that perjury in his favor may be regarded as a reasonable inference.

The end proposed in extracting testimony, is the obtaining the actual recollection of the witness, not the allegations of another person, suggested to and adopted by the witness, and falsely delivered as his. It is apparent that suggestive interrogation leads to the despatch of business, and that sometimes it may be absolutely necessary to recall the attention of the witness to facts which have passed from his memory.

The objection exists in full force, when on the part of the interrogator there is a disposition to afford information for the purpose of eliciting a false answer, and a corresponding design on the part of the witness to make use of the information thus obtained for such sinister purpose. The real danger is that of collusion between the witness interrogated and the counsel interrogating, that the counsel will deliberately imply or suggest false facts with the expectation on his part, and with an understanding on the part of the witness, that he will assent to the truth of the false facts thus suggested. Unless the person interrogating have a sinister purpose, he will not suggest falsehood as and for the truth. Unless the witness be dishonest, he will not affirmatively respond to the falsehood suggested.

The space thus afforded for dishonest concert, the time intervening between the question and its prompt answer, is so brief, that little danger need be apprehended. But if there should be concert and conspiracy, adverse interrogation may be safely relied upon to reduce the dangers therefrom to its lowest degree. The danger from misrecollection, or from a failure to recollect without the aid of suggestive interrogation, is greater than from perjurious testimony consequent upon leading questions. Accordingly the original strictness of the law has been abandoned, and the right of proposing leading questions has been accorded to each party, subject to the discretion of the court, under the peculiar circumstances of each case.(*n*)

(*m*) In Scotland, "leading questions, that is, such as instruct the witness how to answer on a material point, are not allowed" to either party. Tait on Evidence, 427.

(*n*) Parsons v. Huff, 38 Maine, 137. Greenleaf v. Stokes, 3 Gilman, 201.

CHAPTER XIV.

EXAMINATION OF WITNESSES IN EQUITY.

FRAUD, trust, mistake and accident are the principal objects of equity jurisdiction. That the defendant has been guilty of fraud; that he has violated some trust reposed in him; that he has taken some undue advantage of a mistake or accident, are the ordinary allegations in a bill; and if the bill be sustained, these charges so alleged, are to be regarded as true. The peculiar boast of equity is, its efficiency where the common law fails; and this efficiency is mainly attributable to the virtues of its searching interrogatories by which the defendant is, or is expected to be purged.(*a*)

In discussing the modes of examining witnesses and extracting their testimony, regard must be had to two classes,—witnesses who are parties, and those who are not parties in the cause. Accordingly as the witness may belong to the one class or the other, different modes of extracting testimony have obtained, which severally require special consideration.

In equity, the defendant—interested to the extent of the amount involved in litigation,—a wrong doer by the allegations in the bill,—rejoicing in his fraud,—denying his trust obligations, or refusing to execute them,—taking dishonest advantage of mistake or accident,—withholding needed proof—unwilling either to do justice to those whom he has wronged, or to disclose the facts when needed for judicial purposes, and who can only be coerced by the compulsory power of the court to do the one or disclose the other,—is, from the necessity of the case, a witness, and an appeal is made to his conscience. No one but a lawyer would imagine that resort to a court for its aid to compel the performance of what should have been done without its intervention, would be considered the best evidence of integrity on the part of the individual refusing, or that it would be construed into "an emphatic admission, that in that instance the party is worthy of credit, and that his known integrity is a sufficient guaranty against the danger of falsehood."(*b*) Still less would he suppose that under such circumstances trustworthiness surpassing that of witnesses of average integrity, and without interest, would be predicated of and accorded to all defendants in equity whenever their reluctant testimony should be needed. The credit due a witness is usually left to the intelligence and judgment of those who are to hear and decide. In equity, the law measures in advance the credibility of all defendants, and without reference to, or a knowledge of

(*a*) 3 Bl. Com. 437. "When facts or their leading circumstances rest only in the knowledge of the party, a court of equity applies itself to its conscience and *purges him upon oath* with regard to the truth of the transaction."

(*b*) 1 Greenl. Ev. 329.

their testimony, of its truth or falsehood, in utter ignorance of what may corroborate or detract from its weight; and by an unvarying rule, values the testimony of every defendant as uniformly exceeding in probative force, that of one disinterested witness, however great his integrity, and determines that it shall always be regarded as true, unless disproved by two witnesses,(c) or by their equivalent, one with corroborating circumstances. The party who could not be heard before a jury, whose testimony it would be thought dangerous to receive, is judicially adjudged to possess not merely the average veracity of a disinterested witness, but to be clothed with superordinary trustworthiness. All defendants in equity, indeed, by virtue and in consequence of being defendants, in all time past, present, and to come, are thus decreed to be men of extraordinary integrity.

Such being the position of a defendant in equity,—his pecuniary interest at stake,—his personal integrity in issue,—the unmerited reliance placed upon his statements would seem especially to demand that one thus situated should be subjected to a severe and rigid examination, and that whatever securities the law affords against mendacity in testimony, and for efficiency in its extraction, should be afforded. If an occasion could be imagined in which the most stringent and efficient securities for trustworthiness should be demanded, it would be when the witness to be examined is adverse in position, feeling and interest to the person in whose behalf he is to be interrogated. The emergencies of the case would seem to require the adoption of the most searching and rigorous interrogation under all those conditions most favorable for eliciting truth

(c) "Simili modo sanximus, ut unius testimonium nemo judicum in quacunque causa facile patiatur admitti. Et nunc manifeste sancimus, *ut unius omnino testis responsio non audiatur etiamsi præclarae curiae honore praefulgeat.*" Code 4, 20, 9.

The maxim *unus testis nullus testis* seems incorporated in the civil law.

By the Mahommedan law, two men or their equivalent, four women, make full proof.

By the Mosaic law, there must be two witnesses in criminal cases. Deut. 19, 15. But in civil cases the law is otherwise. 4 Michaelis Commentaries, art. 399.

By the law of Scotland, it is a fixed rule that the unsupported evidence of a single witness is insufficient either to prove a criminal act, so as to warrant a conviction, or to establish the ground of action in a civil case. Tait on Ev. 437.

The canon law requires two witnesses. The pope alone can make *full proof.*

"Mais cette règle, utile chez un peuple grossier, qui avait besoin d'être guidé par des prescriptions positives et littérales, ne méritait pas plus d'être transportée chez les peuples modernes, que tant d'autres préceptus de la loi mosaïque dont le caractère local et temporaire n'est pas contesté. Ce fut cependant d'apres ces autorités que les Décrétales érigèrent en règle absolue l'exclusion d'un témoin unique, fût il évêque ou même archevêque; le pape seul avait le privilége d'en être cru sur sa déclaration." Traité des Preuves par Bonnier, 257.

A rule of law more prejudicial to the ends of justice, than that by which two witnesses are needed in all cases to constitute full proof of a fact, can hardly be conceived. By it all men as *units* are decreed to be unworthy of belief. Testifying *in couples*, witnesses may or may not be believed, according to the probabilities of the truth of their testimony. Testifying alone, one witness, though *in fact* the court and the jury may place unhesitating confidence in his statements, yet they are prohibited from deciding in accordance with their convictions. Judgment is peremptorily given as to the credibility of each and every *single* witness, in advance of and without hearing, and for all coming time. Believing the witness, the decision must be as if he were disbelieved. All crimes may be committed with impunity, unless in the presence of two witnesses, or unless their commission can be proved by the required testimony. No contracts can be enforced without the requisite evidence. Justice is denied unless the witness brings his fellow.

and detecting falsehood. Instead of this, it will be found that the testimony of witnesses thus invested in advance with underserved trustworthiness is received not merely without the ordinary securities for a truth, but that every facility which mendacious and unscrupulous knavery could desire is afforded for the successful triumph of fraud, evasion and falsehood.

Oral interrogation and cross-interrogation, in public, by the parties respectively, or their counsel, as well as by all interested in the question, in the presence of the judge by whom the decision is to be made, adopted by the common law and recognized by the civil law, as the only proper and the most efficient mode of extracting the truth from unwilling, willing or indifferent lips, is hardly known in the trial of a cause within the domain of equity.

The problem is how best to extract the truth from the dishonest, reluctant, evasive or adversely interested; for where the reverse is the case, the difficulty becomes almost imaginary. The solution which equity gives,—first ascribing to all defendants extraordinary trustworthiness,—is to send a long, tedious, circumlocutory letter, termed a bill, to the party from whom redress is sought, replete with that cumbrous and verbose technicality in which equity and common law alike rejoice,—to which generally, or to the specific interrogatories of which, he is required to answer. The truth is what is desired. The only interrogation is in and by the bill, or the specific inquiries constituting a portion thereof. Ample time is given for premeditation, for evasion, with counsel learned and adroit in all those resources of language by which the truth may be skilfully concealed or suppressed, or falsehood artfully suggested to aid in preparing a reply to every inquiry, which, apparently without suppressing the one or directly uttering the other, may, by the use of words specially adapted to conceal or evade, approximate to the limits of concealment, suppression or falsehood; an answer which may defeat the very objects of the inquirer.

The examination of the defendant is by a wholesale and general interrogatory, in and by which "he shall be required to answer as fully, directly and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated,"(*c*) or certain definite interrogatories are filed, to each of which a definite answer is required.(*d*) A general interrogatory, or a series of specific interrogatories, "give ample room and verge enough" for concealment or evasion. The whole interrogation is known in advance, so the dishonest and fraudulent may thus avoid all the dangers of an open and public examination. The answers, deliberate, premeditated, are prepared with ample time for reflection; the skill of the counsel co-operating with the sinister interest of the party defendant, when in the wrong, to foil and baffle the inquiries of the plaintiff. Adverse interrogation to any good purpose,—none; for none such can be, except when the interrogator and the interrogated meet face to face, and the sudden and unexpected inquiry must be followed by the prompt answer,—by evasion, or refusal to answer. Write to one whom you assert has wronged you, whom you fear will answer untruly; pre-ordain undeserved credence to his unknown

(*c*) 1 Hoff. Pr. 46. (*d*) Chancery Rules,—§ 1, 37 Maine, 581.

answers; allow him ample time and leisure for evasion, concealment, indirection, and counsel to aid in accomplishing and perfecting those purposes so disastrous to the ends of justice; abstain from all direct and personal oral inquiry, either for your own information or for the instruction of the court, by whom the cause is to be determined,—and you have the system which equity adopts as the perfection of human wisdom. The mode of extraction, absurd as applied to any witness, becomes especially so as to one adversely interested. The wonder is, not that the truth is occasionally obtained, but that the plaintiff desirous of the truth should ever resort to so hazardous an experiment, or should hope or expect to obtain it by means so ineffectual; not that an answer is false and evasive when such encouragement is given to the wrongdoer, but that with means and processes so impotent for good, justice is ever done.

The answer given may be evasive, indistinct, or incomplete. The evasion may be designed, the indistinctness unintentional. The prompt inquiry and the instant answer are the natural and obvious modes of defeating the sinister designs of evasion, or the negligent omissions of incompleteness, or the indefinite vagueness of indistinctness. The only mode recognized in equity is the tedious and dilatory one of exceptions and reference to a master, with delay for the purposes of argument and decision, and a new opportunity, if the exceptions are sustained, of smothering the truth in the verbiage of a new answer, to be again the subject of exceptions and further delays and expense.

Does the answer disclose new facts in discharge or avoidance, in reference to which the plaintiff may require further information,—an amended bill, charging new facts, proposing new interrogatories, with further time allowed for an answer, is necessary to accomplish this desired purpose. Thus delay is added to delay, expense is heaped upon expense, which might all be avoided were the party forthcoming for oral examination in public and in the presence of the court.

The mode of examination being thus obviously objectionable, no less so is the rule by virtue of which restrictions are placed and limits imposed upon the subject-matter to which the witness defendant is permitted to testify.

The examination of the defendant in and by the bill, is, not to ascertain "the truth, the whole truth, and nothing but the truth," but only such special facts as may be deemed important to the interests of the party inquiring. The plaintiff, controlling the interrogatories as far as possible, limits and restricts them to those matters as to which he hopes or anticipates favorable answers. The requirements of his case, not the requirements of justice, are the limitations upon inquiry.

The defendant, though a witness, is only one so far as required by his opponent. In no respect is he a witness for himself and on his own mere motion. His power of effective answer is only so far as the same may be responsive to the bill. He cannot as a witness assert new facts for any of the purposes of evidence. Facts by way of defence,—excusatory, self-exculpatory, or inculpatory of the plaintiff,—if they do not relate to his inquiries and are not responsive thereto, are not evidence in his favor, but must be established by proof from without his answer.(*e*) The

(*e*) Hart v. Ten Eyck, 2 John. Ch. 62; Woodcock v. Bennet, 2 Cow. 711; Boardman v. Jackson, 2 B. & B. 385.

defendant, practically, is only to be examined as to those facts as to which the party examining expects favorable answers. He is only allowed to utter fragmentary portions of the truth; at liberty to answer all inquiries made, not to assert facts in self-exoneration, not responsive to the inquiries of his antagonist; a witness so far as the plaintiff may choose to inquire, not a witness so far as the ends of justice require; not examinable by the court, who are to decide; examinable only by the plaintiff, without liberty of spontaneous testimony on his own part, or of examination or cross-examination by counsel.(*f*)

Not merely are the only reliable securities for the trustworthiness of testimony disregarded in eliciting the testimony of the defendant, but in extracting that of extraneous witnesses, a similar disregard is shown to the only efficient mode of extraction. All the benefits of oral examination and cross-examination in public and in presence of the tribunal which is to decide, are deliberately and unnecessarily surrendered.

In equity, the evidence of extraneous witnesses, upon whose testimony the chancellor rests his judgment, was, and in some cases now is, extracted by written interrogatories duly filed by the respective parties;—the answers to which, reduced to writing in secrecy in the absence of parties and their counsel by a commissioner or examiner, are by him transmitted to the court; and until publication the proofs thus taken are entirely unknown to the parties litigant.

The witnesses are examined by written interrogatories filed by counsel,—each interrogatory proposed in entire ignorance of the answers to each preceding inquiry. If the answers are indistinct, that indistinctness is permanent; if incomplete, that incompleteness is unchangeable; if incorrect, that incorrectness must ever remain; if evasive, evasion is triumphantly successful. No question can be put, based upon or arising from a preceding answer. If the witness is favorable to the plaintiff, intelligent, aware of the question at issue, with fortunate interrogation the truth may be elicited; if adverse in feeling and interest, when, if ever, the plaintiff should be entitled to all the benefits of adverse interrogation, the chance of extracting the truth is almost hopeless.

Cross-examination there can be none. Whether the inquiries proposed embrace all the facts within the knowledge of the witnesses, cannot be known. The solicitor filing his direct, the solicitor filing his cross interrogatories, alike ply their labors, each in utter ignorance of the doings of the other, of the several interrogatories filed,(*g*) and of the an-

(*f*) This rule is rigidly enforced when testimony is taken before a master. It was held, in Armsby v. Wood, Hopk. 229, that a party examined before a master by order of court, in the matter in reference, has a right to give every explanation in relation to the matters inquired about; but he is not thereby *made a witness for himself as to other and distinct matters.* "When a party is examined as a witness against another party in the cause, he stands in the same situation as any other witness, and may be cross-examined by the party against whom he is called; *but his testimony cannot be used as evidence in his own favor. There can be no cross-examination by his counsel; and he cannot give testimony in his own favor, except so far as his answers may be responsive to the questions put by the opposite party.*" Per Walworth, Ch., in Benson v. Le Roy, 1 Paige, 122.

(*g*) "And it is an imperative rule that until examination has been completed and the entire depositions given out, which is technically termed passing publication, *neither party shall be made acquainted with his adversaries' interrogatories, nor with any part of the answers* on either side; and that after publication, no further

swers to their interrogatories. The solicitor, ignorant of the answers given upon the direct examination,—still worse, ignorant even of the questions proposed—cross-examines only upon guessed at and anticipated answers. The interrogatories must be numerous, and in the alternative to meet the possible and contingent replies which may have been made. The answers given on the direct examination,—whether affirmative or negative, direct or qualified, and if qualified, to what extent, and in what direction; whether relevant or irrelevant; complete or partial and incomplete; clear, definite and responsive, or confused and evasive,—cannot be known till after publication; and when thus known, the information comes too late for any beneficial purpose. The party cross-examining, utterly and hopelessly ignorant of all testimony as extracted by the questions of his opponent, if he cross-examines at all, it is in the dark and about he knows not what. So miserably, so deplorably inefficient is the chancery mode of examining witnesses, that the shrewdest solicitors never cross-examine a witness, unless it be one whom the party cross-examining would have called and examined in chief.(*h*)

The duty of the examiner is limited to reducing to writing the answers to the particular inquiries proposed, not to the proposing of new ones, however naturally they might arise from preceding answers. He has neither the zeal prompting to extract from the witness all he may know; or if possessing the zeal, he is without the requisite knowledge as to the inquiries which may be needed; or if possessing both, he is without the power and authority to propose questions and compel answers.

In all testimony, unless the exact words of the answer are given, there is obviously a danger of misunderstanding the witness. But the exact words of the question may not be understood, and if not, a misunderstanding corresponding thereto may occur in the answer; or the witness may omit to mention, or the examiner to take down a material statement; or the answer may be misapprehended or misunderstood, or the exact words being understood may not be given. Different language from that of the witness, intending thereby to convey the same meaning, but actually conveying one materially variant therefrom, may be used. The collocation of the words may vary, and the meaning conveyed by the transcriber may unintentionally differ from that intended by the witness. But whether the difference of meaning or of language is the result of negligence or design, there is no one present by whom it will be perceived, or who perceiving, will have any adequate motive to correct it. The effect, therefore, upon the interests of justice will be quite as disastrous and irremediable as if the mistakes and misunderstandings of the examiner originated from the most perverse design.

By the more modern practice in England and in this country, the original rigor of equity proceedings is somewhat modified, and the depositions of extraneous witnesses may be taken in the presence of parties and counsel, and with the benefits of examination and cross-examination by them.

witnesses can be examined without special leave." Adams' Equity, 367; Gresley, Ev. 58.

(*h*) "I never," says Mr. Bell, "in my later practice ventured to cross-examine a witness, unless he were a witness whom I would otherwise have examined in chief; or to extract some fact to show that he was interested." Ch. Com. App. p. 6, Q. 49. Gresley, Ev. 58.

Whether the testimony of the parties be extracted on bill and answer, that of extraneous witnesses upon written interrogatories duly filed, and in secrecy answered, or upon oral examination in the presence of the parties, the answers reduced to writing, the judge of fact is alike without opportunity to see, hear, observe and interrogate the parties and witnesses upon whose statements decision is to be made. Now among those upon whom in an especial manner the power of interrogation should be conferred, is the judge by whom the cause is to be determined. Indeed, it may be regarded as an axiom, that, *except when prevented by preponderant delay, vexation and expense,* the evidence should in all cases be extracted in the presence of him upon whom is devolved the responsibility of decision. His view of the cause, of its merits, of the weight of evidence, of the inferences deducible therefrom, may differ from that of counsel. He may require further and additional questions for the correct understanding of the cause, or for its complete elucidation. He may perceive doubts, he may see occasions for inquiry which counsel fail to perceive or see. He may need explanations to remove doubt, uncertainty, indistinctness or incompleteness; he may wish to make inquiries for that purpose,—yet as to all this he is powerless. The chancellor by whom a cause is to be tried, brings to the performance of his duty integrity and intelligence. As the trial proceeds (or as it should proceed, the parties and witnesses being examined in his presence,) he acquires a knowledge of the facts on both sides. He perceives where there is doubt, where indistinctness, where contradiction, and what inquiries may be needed to elucidate doubt, to remove indistinctness, to explain contradiction, yet indifferent to parties, not indifferent to the just decision of their rights; he is precluded from making any and all inquiries. By such an interrogator no questions can be asked. The day of interrogation is over, or rather as to him it has never dawned.(*i*)

The appearance and manner of a witness, the readiness and promptitude of his answers, their fulness, clearness, and distinctness, or the reverse, afford no slight indications of the truth or falsehood of his testimony. All this is lost where one collects and another decides. The judge, to decide, neither sees nor hears the witnesses;—all the instruction demeanor can give is lost upon the person before whom the proof is taken, and withheld from him whose duty it is to decide upon its trustworthiness when taken;—useless to the one collecting, indispensable to him for whose use it is collected, but whom it never reaches.

The rude legislation of early ages(*k*) regarded the appearance and

(*i*) Quant aux *inconvenances* d'entendre les témoins à l'audience, ce language est vraiment étonnant.

L'empereur Adrien, loin de croire la majesté du trône blesseé par l'audition des témoins, pensait qu'il était de son devoir de les interroger; *Namqueipsos interrogare soleo.* Les convenances sont elles donc blessées par l'audition des témoins devant les cours d'assisses?" 9 Toullier, § 324. Alia est auctoritas testium presentium alia testimoniorum quae recitari solent.

(*k*) "Let the king or his judge having seated himself on the bench, his body properly clothed, and his mind attentively fixed, begin with doing reverence to the deities who guard the world; and then let him enter on the trial of causes. . . By external signs let him see through the thoughts of men; by their voice, color, countenance, limbs, eyes and action. From the limbs, the look, the motion of the

manner of the witness as the surest means of instruction to the judge of fact however named; and the polished and refined civilization(*l*) of later ages has recognized and sanctioned its wisdom. But appearance and manner are not all. The exact words used, the change of a word, the emphasis of the witness, the gesticulations of the body, the play of the the features, may be important in ascertaining his meaning, and in determining his trustworthiness. Of the precise words spoken, their order, the appearance and manner of the person uttering them, the judge of fact can only be assured by the eye and the ear, not at all by the written report.

How weak and powerless the testimony of depositions compared with that of a living and speaking witness, seen, heard and examined. How different the eloquence of the written speech and that of the spoken oration. The chancellor delighteth in the deaf and dumb testimony of depositions,—*surda et muta testimonia*, testimony which cannot hear, which cannot see, which cannot answer,—deaf to inquiry, dumb to answer.(*m*)

By the original rules of chancery practice, neither party was permitted to know the testimony in a cause till after publication; after which no one could be examined without special leave of the court, for the correction of mistakes on the part of other witnesses, or even of those in his own testimony. "The protracted nature of a written examination necessarily involves the risk that defects of evidence might be discovered in the course of taking it, and false testimony procured to remedy them."(*n*) To avoid this risk witnesses are examined privately, and until publication passed, neither party is acquainted with the interrogations filed or answers given, and "and after publication no further witnesses can be examined without special leave."(*o*)

When evidence is extracted in a mode so defective, the risk is undoubtedly great, "that defects might be discovered in the course of taking it." The remedy for this evil would naturally seem to be the providing a better mode for its extraction. But if that be denied, and if defects exist, why not correct them by new and additional proof. The answer is, because of the danger of "false testimony procured to remedy them,"—lest "people seeing where a cause pinched, they should then be at liberty to look out witnesses to bolster up the faulty part of the cause; the necessary consequence of which would be perjury.(*oo*) But whatever the defect, whether of omission or commission, of incompleteness or of falsehood, wherever the cause pinches, the defect may be remedied, the faulty part may be bolstered up by true testimony; and if so, what harm can arise? Whether the new testimony will be true or false, cannot be known in advance. To refuse to receive it because it may possibly be perjurious, is to presume falsehood rather than truth. If there be falsehood in the original testimony, it cannot be known till after publication, and when known it is too late to correct or disprove it. The fear of perjury secures its triumph, for until its

body, the gesticulation, the speech, the changes of the eye and the face, are discovered the internal workings of the mind." Institutes of Menu. Ch. 8, § 23, 24, 25.

(*l*) 9 Toullier Droit Civil Francais, § 324. "Enfin, il est reconnu que l'audition des témoins, *en presence des juges*, est la voie la plus sûre, la seule peut être de découvre la vérite."

(*m*) 9 Toul. § 324. (*n*) Adams, Equity, 367. (*o*) Adams, Equity, 367.

(*oo*) Per Lord Nottingham in Jones v. Purefoy, 1 Vern. 47.

existence is known its refutation is not perceived to be necessary, and when known it becomes impossible. Indeed, so reluctant are courts to receive new testimony, that Story, J., in Wood v. Mann, 2 Sum. 335, says, "if I were called upon to frame a rule, it would be to exclude all testimony of newly discovered witnesses to any facts unless connected with some newly discovered documents."

In some instances witnesses are re-examined for the purpose of correcting errors or mistakes in their testimony, but never as a matter of right. "This witness," says Sir John Leach, in Bott v. Buck, 6 Mad. 66, "having been examined on the part of the plaintiff, has since seen a written paper signed by himself, which is in possession of the defendant, which he admits is at variance with his testimony. He *now desires to be examined to correct his former evidence.* A re-examination would be dangerous to *justice and cannot be permitted.*(p)" But why not correct mistakes? why not receive explanations? The mistakes of misrecollection, indistinctness or incompleteness,—why should they not be corrected? "A re-examination would be dangerous to justice!" Is not the refusal to re-examine still more dangerous? Fear of perjury the reason why no new inquiry should be had of a witness who may have made a mistake and is desirous to correct the same! But what more danger of perjury in the second than in the first answer? If a witness wishes to correct or alter his statement, because erroneous or incomplete, is not the correction or addition not merely permissible, but in the highest degree desirable, due alike to the integrity of the witness, the rights of the parties, and the cause of justice?

The inefficiency of the modes of extracting evidence in equity, their entire unfitness, their utter worthlessness for, their opposition to the great ends of justice; "the deficiency of trial by written evidence," are so fully recognized by the court "that it will not bind the parties thereby, but will direct the matter to be tried by a jury."(q) The court, with full authority to decide all controverted questions, dissatisfied with its own rules,(r) fearful of a failure of justice when it is administered in accordance therewith, will in general direct an issue in order to relieve and ease its own conscience, and to be satisfied, by the verdict of a jury, of the truth or falsehood of the facts controverted, lest, "taking upon itself to pronounce decidedly upon a matter of such uncertainty, it might do injustice to one of the parties by determining against the truth of the fact."(s) The cause is therefore sent to another tribunal, the special and peculiar excellence of which is, that its mode of weighing and comparing evidence, and its course of procedure, is utterly variant from that adopted by the court, which from its own incompetency to decide, sends its disputed issues to another jurisdiction for determination, without however being bound or intending to be bound by its decisions.

(p) "No more dangerous mode of proceeding can take place than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original depositions by other evidence." Whitelock v. Baker, 13 Ves. 54. But what is the harm in making out evidence by piecemeal, so it be true? Why not make up deficiency in original depositions? Is it not the very thing of all others especially desirable? (q) 2 Daniel, Ch. Prac. 1192.

(r) "Considering the inefficiency of written testimony." Adams, Eq. 376.

(s) 2 Dan. Ch. Pr. 1286.

The cases specially selected for this procedure, are those cases where "there is a want of evidence, or the testimony is contradictory and so nearly balanced, that it is necessary there should be an open and rigid cross-examination before a jury,"(*t*) "where there is contradictory evidence between persons who are of equal credit," where the evidence is so equally balanced on both sides that it becomes doubtful which scale preponderates,(*u*) "when there is *no* contradictory evidence or any matter to embarrass the court or prevent its coming to an immediate decision upon the question before it,"(*v*) where the case is not sufficiently proved, or the question turns upon conflicting presumptions of fact,"(*w*) or when the chancellor *would shirk the responsibility or fears the unpopularity of a just decision.*(*x*) But are not these cases specially requiring the enlightened judgment of a learned and able judge? If the evidence is neither contradictory nor equally balanced, nor needing cross-examination, any body may decide. But if the evidence is conflicting, if a comparison of the testimony and carefully weighing and determining its effect be required, such are the cases when the experience and ability of the chancellor are most needed. But in these it seems he is incompetent to the discharge of the duties he has assumed, and the trial must be transferred to another tribunal. The chancellor throned in his seat of power, fearing lest justice may be unpopular, and dreading the responsibility of doing it, refuses to discharge his duty, and devolves its performance upon a tribunal evanescent and feebly resistant to the fluctuating counsels of the popular mind.

The principal reason for sending a cause to be tried by a jury at common law, is the inefficient and unsatisfactory mode of examining witnesses in equity.(*y*) But if the chancery mode of examining witnesses and extracting testimony is the reason for sending the cause to another tribunal, the proper course would seem to be to abolish the rules in equity which have proved so unsatisfactory, and adopt those of the common law. If the conscience of the chancellor is so dissatisfied with the rules of his own court as to deem it dangerous to decide questions upon depositions, why are not they changed, and the witnesses heard? By the Roman law parties and witnesses were examined and cross-examined in public, and before the judge by whom the cause was to be determined.(*z*) The imperial majesty of Rome did not disdain to seek

(*t*) Townsend v. Graves, 3 Paige, 453. (*u*) 2 Dan. Ch. Pr. 1285.
(*v*) 2 Dan. Ch. Pr. 1287. (*w*) 2 Dan. Ch. Pr. 1291.
(*x*) The chancellor directs an issue among other reasons, "where he thinks it better that the responsibility and perhaps unpopularity of deciding should be thrown upon that evanescent tribunal, a jury." Gresley, Ev. 401.
(*y*) In Burford v. Domett, 4 Ves. 760, the Master of the Rolls says, "Then it is impossible to sit here any time, without seeing that a *viva voce* examination of witnesses is much more satisfactory than deposition where a possibility of doubt can be raised. * * * I should do a most dangerous thing if I was to decide this question upon these depositions."
(*z*) "Et même anciennement les interrogatories des témoins étoient tellement en usage, que non-seulement les juges, mais même les partiés et leurs avocats, pouvoient les interoger en présence du juge, comme a fort bien remarqué Budee, contre l'opinion de Bartole, ainsi qu'il le prouve par plusieurs exemples des anciens, et principalement par le témoignage de Quintilien et Ciceron: *Est-ce-là un si grand sujet de louange pour un avocat? (dit il.) Il a interrogé le témoin à*

the truth by the natural and only direct mode of interrogation. In the early days of equity procedure, the examination of witnesses was in open court, and there is an original authority inherent in courts of equity, "always asserted but very seldom exercised, of calling on a witness to give his evidence in open court."(a) But if existing, why should not the authority be exercised when it is seen and perceived to be so necessary and indispensable to the purpose of justice?(b)

The issue directed, the chancellor orders, or may order,(c) the oral examination and cross-examination of the parties before the jury, thus requiring the use of testimony alike inadmissible by the rules of equity and the common law. The general course of equity procedure remains intact. When the order is made for a trial by jury, the rules of equity are changed, not for the court, but for the special cause to be tried. "An issue directed by a court of equity is directed solely for the information of the court, and is in the hands of the court. It may be modelled in any shape. And the court may compel the parties to admit evidence which is not strictly legal evidence, and it has other distinguishing incidents."(d) The defendant, whose evidence in equity is available for himself only so far as the same is responsive to the bill, ineffectual as to aught else; the plaintiff, excluded entirely,—both inadmissible at law, because of the perjurious tendency of their testimony,—are both heard when information is sought to relieve the anxious conscience of the chancellor. The reason is, they are not witnesses for themselves, but for the court.(e) Not witnesses for themselves? Why not? If their testimony be self-serving, why are they not witnesses for themselves equally with other witnesses? How witnesses of the court, which refusing to see or hear them, sends them to another tribunal equally reluctant, but which from comity unwillingly receives and acts

propos; il l'a engagé avec tant d'adresse à lui repondre, qu'il s'est entrecoupé dans ses réponses; il lui a fait dire la verité malgré lui, il l'á convaincu, il l'a rendre muet. Ce qui marquè que l'ancien usage etoit de permettre aux avocats des parties d'interroger les témoins; ce que le même Budée estime avoir aussi été observé par Justinien. "Traite de la preuve par témoins.—Preface de Boiceau, 21. Essai sur la nature des preuves, par Gabriel, 293.

(a) Gresley, Ev. 43, 379.

(b) "Peut être encore, un autre raison que l'on n'oserait avouer, â secretement influé sur ce point de notre legislation; l'ennui que fait éprouver aux juges l'audition des témoins, qui, en accelérant le cours de la justice, allonge neanmoins, les audiences; la perte de temps dont se plaignent les avocats, quoique bien hors de propos, puisqu'ils peuvent trouver dans les interpellations qu'ils out la faculté de faire aux témoins par l'intermédiaire du president, les moyens les plus surs de faire triompher la justice de leur cause." 9 Toullier, § 324.

(c) 2 Dan. Ch. Pr. 1298; Hoff. Ch. Pr. 505. "The court will sometimes order the examination of both the parties."

(d) Per Richards, B., in Bullen v. Michel, 2 Price, 254, n.

(e) In De Tastet v. Bordenave, 1 Jac. 516. In this case both parties were ordered to be examined upon the trial of the issue directed by the Master of the Rolls. Upon appeal, the chancellor, Lord Eldon, says, "This order is imperative, making it necessary that *both should be examined*; if it only gave liberty to examine them, it would be different. In that case there would be no default in not calling them. But this order is as plain as possible: both are to attend and be examined. The matter is often mistaken at common law. When the parties are to be examined, *it is not meant that they should be witnesses for themselves or the other side, but they* are witnesses for this court."

upon evidence which its own rules forbid? If witnesses for the court, why does the court, for whose instruction they are called, refuse to hear and examine them? Why, if witnesses of the court, send them to another court when they might have been heard and examined in his own?

If there is any rule well settled, it is that a court of equity will not make a decree against an answer, when the bill is only supported by one witness. The rule is recognized in all the reports. It is lauded, absurd though it be, by the whole series of chancellors, by whom equity has been administered. Yet it seems, when an issue is directed, "the answer will be ordered to be read and to receive such credit as the jury shall find it deserves,"(*f*) thus reversing the invariable rule of equity, which accords such undeserved credence to an answer.

The chancellor, it has been seen, where an issue is directed annuls or reverses *pro hac vice* his own rules of evidence, of the weight of evidence and of its extraction. He orders the parties to be examined, so that when an issue is tried, it is tried upon evidence not admissible by the rules of the court trying the issue. He orders the witnesses to be examined orally, thus disregarding the rules of the court, for whose information the trial is had. In equity, a preordained credit is given to the answer of the defendant. At law, his credibility is submitted to the jury. The decree resting upon the issue is based upon a violation of the rules of the court by which it is made. The conscience of the chancellor refuses to be informed, save by a violation of his own rules. Nor is that all. He equally requires a violation of those of the court to which he sends the cause for trial, and through whose aid he expects the information so needful to his conscience.

The chancellor, one would suppose, should either determine the facts for himself, or should be bound by the decision of the jury to whom he has referred the cause. But he does neither. He refuses to decide the facts himself. He may or may not adopt the verdict of the jury. If the verdict is not satisfactory, it does not bind the conscience. The conscience of the chancellor refuses to be thereby informed, and will not abide the result. "This court," says the chancellor, in Stace v. Mabbott, 2 Vesey, Sen., 552, "directs issues to be tried at law, to inform the conscience of the court as to facts doubtful before, and therefore expects in return such a verdict and on such a case, as shall satisfy the conscience of the court to found a decree upon. If, therefore, upon any material or weighty reason, the verdict is not such as to satisfy the court that it ought to found a decree upon it, there are several cases in which this court has directed a new trial for further satisfaction, *notwithstanding it would not be granted in a court of common law*, because it is *diverso intuitu*, and because the court proceeds on different grounds."(*g*)

(*f*) In De Tastet v. Bordenave, Jac. 521. The chancellor, Lord Eldon says, "*It is difficult* to know on *what principle* the court proceeds in these cases. If there be only the evidence of *one* witness against the answer, the court will not make a decree upon it; *and yet the cause is sent to an issue*, and if it appears upon the postea that *one* witness was examined, *the court will make a decree founded upon it.*"

(*g*) "He will pay no attention to the most flagrant misdirections of the judge, or mistakes as to the admission of evidence," &c. &c. Gresley on Evidence, 405. "The rules for granting a new trial are extremely indefinite." Ib.

But to know whether to be satisfied with the verdict or not, the chancellor must read the evidence. But he sent the cause to a jury for trial because he perceived the absolute necessity of the public and oral examination of witnesses, which his own rules forbade to be done. But reading a report to determine whether he will or will not be informed by the verdict, he loses the benefit of oral examination to a great extent, for no report can do entire justice to a witness. The language may vary, the manner, the appearance, the unmistakable indications of deportment, are lost. But if "the deficiency of trial by written testimony" be such that the chancellor refuses to try causes upon such proof and therefore sends them abroad for trial,—how can he, if incompetent in the first instance to decide for himself, be more competent to determine whether others, with better means, with the very means the want of which induced him to refuse to try the cause, have rightly decided,—to weigh and compare the evidence, and see on which side it preponderates? How is he better fitted after to determine its correctness, than he was before to decide for himself? If competent to decide, why send abroad for the enlightenment of his conscience? A verdict found, he re-examines the case or not. If not, then he cannot determine the right or the wrong of the verdict. If he does examine the evidence, and upon such examination determines the verdict to be erroneous and therefore orders a new trial, with inferior opportunities of judging, he sets aside the action of those, who must have heard the case under the most favorable circumstances. Why should he send a cause to a tribunal before whom the evidence is extracted in the best mode, and then, with inferior means of forming an opinion, determine against the judgment of that tribunal?

The evidence after publication must first be examined to ascertain if the cause be one in which the conscience of the chancellor will need information. If it be such, for it will not be sent without knowing that fact, he sends the cause to be tried by a jury. The issue tried by a jury and a verdict rendered, to determine whether it shall be the basis of judicial action, the evidence must be again examined.(*h*) The evidence must be three times examined; it may be more if the verdict be not satisfactory. Twice examined by him whose duty it is to decide—who refuses to receive evidence extracted in the best mode and act upon it, but is not unwilling to overrule the decisions of those whose means for forming a correct opinion infinitely exceed those, which have fallen to his lot.

Now why should not the cause originally have been heard and determined by the chancellor? Could not he better perform the duties he transfers to and imposes upon others? Desirous of having the parties heard by the jury, why did he not hear them in his own court? Sensible of the importance of examination and cross-examination, why does

(*h*) "When the verdict is returned, the equity judge does not look barely to the wording of it * * but he inquires into all that passed during the proceedings. For this purpose he listens to the statements of counsel, detailing what occurred at the trial; and if he sees occasion for it, he sends to the judge who tried the issue, for his notes. After all, he may, if he thinks fit, make no use of the verdict but treat it as a mere nullity." Gresley's Ev. 405.

he not require it in his own court? Will it occupy too much of his time? But somebody must hear and determine? He examines the cause to determine if fitting for a jury. He examines the evidence to ascertain if the verdict be in accordance with the proof. The time of the judge and of the jury is occupied? Would not time, delay and expense be saved, if the chancellor, in the first instance and with the evidence extracted in the best mode, should decide for himself? Why then does he not satisfy his own judgment by seeing and hearing the witnesses and weighing the testimony,(*i*) rather than by deferring to the judgment of any twelve men accidently selected by lot? Is he not as competent as any twelve men? Why does he not see, hear and decide, instead of basing his decree upon the verdict of men, strangers to him, of whose intellectual fitness and capacity for the task he is utterly ignorant? Yet he acts upon the judgment of a jury *when it coincides with his own.* When otherwise, he sets it aside. In no case where an issue is ordered does he judge for himself, and decree upon his own judgment.

Courts of equity, recognizing the worthlessness of their own rules for the extraction of evidence, yet defend them notwithstanding they are so bad, that when a question of controverted facts arise, they are trampled under foot.

"The trial and determination of disputed issues are not the principal objects of evidence in equity; for the nature of the cases there litigated does not generally give rise to such issues; and those which do occur, if they present any serious difficulty of trial, are generally referred to the verdict of a jury. The power therefore of sifting and comparing testimony, which is the primary requisite at law, becomes comparatively unimportant in equity; and the principal objects there contemplated are, first, to elicit a sworn detail of facts, on which the court may adjudge the equities; and secondly, to preserve it in an accurate record for the use, if needed, of the Appellate Court."

"For this reason it is required in equity that all witnesses shall be examined before the hearing, and their answers taken down in writing, so that when the cause comes on for decision the judge may not be distracted by the trial of separate issues on evidence then brought forward for the first time, but may give his undivided attention to the decree, which the facts admitted or proved will warrant; and that, if his decree

(*i*) "What is really wanted, is the oral examination and cross-examination of the witnesses; and the assistance of a jury is, as it seems to me, only incidental to this important object. I for one should be quite as well, and perhaps better satisfied, if instead of directing issues, the trial of which often miscarries and causes infinite expense to the parties, it were competent to this court, in such cases, either to direct an issue or to require the oral examination of witnesses to take place before itself, on an issue previously defined. *The conscience of the court, I should apprehend, would be quite as well satisfied by its own immediate conclusion on the evidence as it could be mediately through the opinion of the jury*, who in cases of this description are sometimes not altogether free from prejudice." Per Mr. Baron Alderson, in Barnes v. Stuart, 1 You. & Col. 139. In Margareson v. Saxton, 1 You. & Col. 532, the same learned judge says, "I wish I had the power of examining witnesses in this court. If the parties by consent will give me that power which I wish all courts of equity had, I will examine them."

be appealed from, the Court of Appeal may have in an authorized record all the materials upon which it is founded."(k)

"The trial and determination of disputed issues are not the principal objects of evidence in equity, for the nature of the question then litigated does not generally give rise to such issues." But all litigation involves disputed issues. The question in equity for determination necessarily gives rise to disputed issues. Contracts unperformed, trusts denied or unexecuted, fraud alleged and denied, accidents or mistakes asserted, of which the complaint is that the defendant unjustly avails himself,—are not these disputed issues, and of the greatest moment, and are not these the usual and ordinary topics of equity jurisdiction? If there be no issue, there is nothing to dispute about. The plaintiff alleges a breach of trust. The defendant denies it. The plaintiff asserts a fraud to have been committed, or that advantage is taken of some mistake or accident. The existence of the fraud, accident or mistake are the questions in controversy; questions in issue, as much put in issue by the answer denying the allegations of the bill as by any general issue whatever. When there is no assertion nor denial, there is no issue. Then there is nothing about which to litigate, unless it be some matter of law arising upon the admitted allegations of the bill. If the bill be true by the admissions of the defendant, there need be no question of evidence. If the answer deny the assertions contained in the bill, then and then only is there an issue. It is none the less an issue, to the proof of which evidence may be required, because the technical issue of the common law has not been adopted; and in lieu thereof, the answer diverging from or denying the allegations in the bill is the mode adopted for presenting the grounds of the controversy and the facts controverted.

"The power of sifting and comparing testimony, which is the primary requisite at law, becomes comparatively unimportant in equity." But if there be disputes; if controversies arise; if the evidence be contradictory and conflicting,—is it not desirable that the contradictory and conflicting testimony be sifted and compared, so that the due and just measure and degree of credence may be given to the several witnesses, from whose variant and opposing statements contradiction and conflict may have arisen. If there be opposing and conflicting proof, the special need of sifting and comparing exists equally in equity as at law—exists whenever and wherever there is conflict and opposition of proof—exists whenever and wherever just decision is desirable. When the facts are admitted, then the controversy relates only to the law upon the facts as conceded.

"To elicit a sworn detail of facts on which the court may adjudge the equities," seems to be one of "the principal objects there contemplated." "A sworn detail of facts," where the facts are not detailed, is all equity pretends to accomplish. A sworn detail, with the indistinctness, incompleteness, inaccuracy and omission necessarily incident to the unsatisfactory and imperfect mode of extraction adopted in equity, would hardly seem to be an object. The inefficiency of the equity mode of

(k) Adams' Equity, 367.

extracting testimony conceded, a sworn detail, thus obtained, would be valueless where the evidence is conflicting, for the chancellor never sifts or compares evidence, but sends it elsewhere to be done. A sworn detail, when there is no contradiction, is a case when the facts are undisputed; when they are disputed, equity, with its mode of procedure and practice, is hopelessly incompetent to ascertain, amid the conflict of contradictory statements, where the truth may be.

One of the reasons why written testimony only is used in equity, and oral examination of witnesses is forbidden, is, "that when the cause comes on for decision, the judge may not *be distracted by the trial of separate issues* on evidence there brought forward for the first time, but may give *his undivided attention to the decree*, which the facts proved or admitted will warrant." But if separate issues arise, why should not the judge be distracted by their trial, so far as that may be the necessary effect of trying them? What shall be the decree, is the final question. The evidence is only material so far as it bears upon the decree. Every controverted fact may present a separate issue, more or less important as affecting the final judgment. Whatever and however great the distraction of separate issues, it is the unavoidable distraction necessarily incident to litigation. If the chancellor is to decide anything, it is separate issues as they may arise, nothing else. Somebody must determine them. Is the distraction any the less for a jury than a chancellor? And is the distraction incident to determining a disputed issue, a reason why it should not be determined, or why he whose duty it is to do it should shrink from and transfer its performance to others?

Another reason assigned is, "that if his decree be appealed from, the Court of Appeal may have, in an authorized record, all the materials on which it is founded." In other words, the reason why proof must be defectively taken is, that it may be preserved, and be forthcoming in case of an appeal. But why provide for an appeal? This reason only applies when there is one. But suppose an appeal, how far and to what extent does this reasoning apply? Why take evidence in a mode admitted to be bad because of a possible and contingent appeal. If there be an appeal, is that any reason for a defective mode of proof before the court from whose decision the appeal is taken? Why should the record be made from such defective materials? If an appeal there must be, would it not be better that the court of original and appellate jurisdiction should alike have the proof extracted in the most reliable and trustworthy manner for the ends of justice?

A rule of evidence without its exceptions utterly inconsistent with the rule itself, would be a legal anomaly. Accordingly, at the hearing, witnesses are orally examined for the purpose of proving exhibits and for other causes. When a reference is made to a master for any purpose, he disregards the rules which guide the court whose servant he is, and orally examines the parties and witnesses, whenever their testimony is needed for his own instruction. Desirable as correct decision may be on his part, is it any less so on the part of his superiors? Desirable as it may be, that the servants of the court should receive evidence in the

best form, is it any the less desirable that the chancellor should do the same?

The conclusion is, that the existing rules of extracting evidence in equity are inconsistent with each other, and with those of the courts of common law—are at variance with, and opposed to the ends of justice, and are intrinsically bad; that the chancellor needs the best evidence, extracted in the most reliable manner, and that the parties and witnesses should be heard and examined orally before him, as at common law, and that he should decide the causes submitted to him, instead of shirking responsibility and labor by devolving his own duties upon a jury.

In other words, whether testimony be desired in equity or at law, before a chancellor or a jury, before a chancellor or his master, all attainable and forthcoming proof should alike in all cases be received; and being received, should be extracted in the most effective and trustworthy mode.

CHAPTER XV.

THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES IN LAW AND EQUITY, AS TO FACTS WHICH MAY TEND TO EXPOSE THEM TO PENALTY, FORFEITURE OR PUNISHMENT.

In the examination and cross-examination of witnesses on a trial at law or in equity questions are proposed, the answers to which at some future time and in some other process, might expose or tend to expose the witness truly answering to penalty, forfeiture or the severest inflictions of the penal law. Such inquiries the witness not unnaturally objects to answer. Shall he answer?(a)

In all controversies between parties litigant, rights are asserted and denied. The object of the law is to ascertain the facts. The claims and counter claims of the parties rest only on the facts. Without their ascertainment the law cannot be rightly administered. If the facts necessary for correct decision are suffered to be withheld in whole or in part, then the law is applied to a different set of facts from those actually existing,—to non-existing facts,—and justice is not done.

The question proposed is material, relevant, important, pertinent to the issue, seeking facts necessary to the maintenance of the just rights of the party inquiring. The fact sought to be proved is known to the witness to exist,—is one, which may legally be proved, and which being proved, is essential to the true understanding of the cause and its correct decision. It is no fault of the party needing this testimony, that the witness may have committed an offence of greater or lesser magnitude. The party seeking the proof has done no act deserving or requiring punishment. He has violated no law. He demands only the enforcement of his rights in accordance with the law as applied to the facts as they exist and may be proved. The proof sought is indispensable to the maintenance of his claim or the establishment of his defence. If permitted to be withheld, he is punished without fault on his part by the loss of his cause or the failure of his defence. The answer would be true. The objection of the witness assumes it would be, and hence his reluctance. If the reluctance of the witness to answer is to excuse him from so doing, then the proof by which the claims of the party in the right might be established, will be withheld. True, the answers if remembered would furnish proof, which on some future occasion might lead to the conviction and punishment of the witness, but the inquiry is made with no such purpose and with no such intention. The party asking needs the answer now—in

(a) See chapter VII., on the admission of parties in criminal procedure.

the present case. The issue is between justice and injustice—between right and wrong. By requiring an answer the needed proof is obtained, and in that way alone justice may be done to the party, and a chance be afforded for doing justice to the witness hereafter. Shall then the evidence be furnished so that a correct decision may be had in the case on trial, or shall it be withheld and injustice knowingly and wittingly be done, for fear lest if the witness were compelled to answer, the facts thus reluctantly disclosed might hereafter possibly lead to his conviction of an offence acknowledged to have been committed by him?

It may be urged that the constitution protects the witness from answering. But a recurrence to the words of that instrument will show that it furnishes no ground for the exemption of a witness from answering any inquiries which may be proposed. It provides that(*b*) "*in all criminal prosecutions the accused* * * shall not be compelled to furnish or give evidence against himself." This has relation only to criminal prosecutions and to those—*the accused*—against whom such prosecutions have been instituted. It was intended to prohibit the star chamber practices of the olden time, and the inquisitorial procedure of the civil law in the investigation of crime and the trial of the criminal. It refers only to the interrogation of the defendant in the criminal prosecution to which he *is* a party. It does not apply to the case of a witness, nor was it intended so to apply. It does not provide, that a witness, when the property, liberty or life of another is in peril, shall be privileged from disclosing true and needed facts, from a fear that those facts may hereafter in some possible and contingent prosecution be used to his prejudice. It does not mean that right and justice shall be postponed to crime,—and that a witness shall be exempted from giving testimony when the life of an honest man is in jeopardy, lest the answer might possibly lead to his conviction. It only means that when one is a party to a criminal prosecution, he shall not in that cause be subjected to examination in relation to the offence with which he is charged. It is in the common law, that is to be found the rule of evidence imperilling the honest man from an absurd and exaggerated sympathy for wrong doers.

The court perceives, it is apparent to all, that justice is unattainable unless the witness answer. The sole object of the inquiry is to procure evidence bearing upon the rights of the parties. If the answer may hereafter be injurious to the witness, such was not the purpose of the party interrogating, nor should he be held responsible for, or be made to suffer in consequence of, any supposed collateral results, which may contingently happen in consequence of his inquiry. Other witnesses free from crime and the perils of crime are required—compulsorily required—to answer. Why should one witness be exempted from answering, while others are compelled to answer? What the reasons for this distinction? What the grounds of special exemption from the performance of a duty common to all citizens—that of answering pertinent inquiries, when proposed in the course of judicial proceedings? The witness has violated

(*b*) Constitution of Maine, Art. 1, § 6. The constitutions of the United States and of the several States have a similar provision and using nearly the same language.

the law. He has committed a crime. Suppose he has; is that a reason why the party in the right, needing his testimony, should be denied justice, or why the party in the wrong should prevail, as he will, unless the answer be given? It will be hard for him to answer! But it is no more hard for one witness to state a particular fact than for another. The hardness then is not in the answer, but in the consequences, which the unwilling witness fears may follow from his answer. Whether conviction will even take place is uncertain. If the fear of possible punishment is a sufficient reason for exempting a witness from answering, because of the conviction which may ensue from such answer—much more is it a reason for exempting from the punishment which actually follows,—a reason stronger in proportion as the punishment is harder to be borne, than the fear of its contingent and possible infliction. The reluctance of a witness to answer can never be so great as his reluctance to suffer,—and if reluctance to suffer be deemed a valid ground for exemption from punishment, it is obvious enough that it will never be inflicted. Shall then the witness answer? Not unless he chooses. It is the PRIVILEGE of the witness. He need not answer "where the answer will *have a tendency* to expose the witness to a penal liability or to any kind of punishment, or to a criminal charge."(*c*) The witness claims his privilege(*d*) and declines answering. What has he done to entitle him to privileges over other citizens? He has committed a crime, and is reluctant to disclose what hereafter may tend to prove the offence of which he is guilty. The party, whose rights are endangered, has no privileges; unjust burdens may be imposed, unmerited punishments may be inflicted if he fail in obtaining the needed answer to his inquiry. The privilege of testifying or not, as he pleases, is accorded to the knave and the felon. The rights of the State and of the citizen are postponed. Why, and for what is this privilege granted. Because of crime and for its impunity, lest by means of and in consequence of the proof furnished by the answer, the witness may hereafter be subjected to the penalty or the punishment which the law has affixed to his misconduct. It is the PRIVILEGE of CRIME.

But suppose the witness answers, it by no means follows that the future suit will be brought or the future indictment found—that the penalty or forfeiture will be enforced or the crime punished. The answer does not directly lead to loss or punishment. The anticipated danger to the witness is uncertain, remote, contingent, the actual loss to the party inquiring, certain, instant and unavoidable.

But if the answers are given, the suit for the penalty is brought, the indictment for the crime is found, the judgment rendered for the penalty, the conviction of the criminal had, by and in consequence of the answers given and the proof furnished by such answers, are these results to be regretted? No more than justice is done. There can be no error nor

(*c*) 1 Greenleaf, Evidence, § 451.

(*d*) In case the witness is compulsorily required to testify, it is not a cause for a new trial. It is the privilege of the witness. "If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness." Cloyes v. Thayer, 3 Hill, 564. Ward v. People, 6 Hill, 145.

mistake. The proof is most satisfactory. The law is enforced, and that can afford no cause of grief to the public, however much it may to the witness whose disclosures have led to its enforcement.

In the last case, justice is twice done, to the party asking and to the witness answering. If the privilege of silence be given the witness—then is there twice a failure of justice; to the party asking—to the witness declining to answer.

The practical effect of this rule may best be illustrated by a recurrence to cases in which the witness by invoking its aid, has been enabled to deprive the party of the evidence necessary for the just decision of his cause.

A suit is brought for the breach of a promise to marry. The defendant alleges that he is absolved from the performance of his promise by reason of the unchastity of the plaintiff. The fact, if proved, would establish a perfect defence, for her dissolute conduct would fully justify the defendant in abandoning her. A witness is called, by whom the defendant expects to prove criminal connection with her. "The fact that the witness had criminal intercourse with the plaintiff was one which the defendant had an undoubted right to establish." But "the witness was not bound to answer the question," (if he ever knew of any person having criminal connection with the plaintiff,) "so far as the answer would criminate himself."(*e*) It is his privilege. If there had been criminal intercourse between the witness and the plaintiff, the defence was established. That there had been, the refusal to answer clearly indicates. There was no claim for damages. But the privilege of the witness takes precedence of the right of the party, and he is compelled to pay damages for not marrying an abandoned woman, and that too, when if the existent proof had been required and given, a perfect defence would have been shown.

Proceedings under the Bastardy act are instituted, in which the complainant seeks to impose on the defendant the burden of supporting a child, of which he denies that he is parent. Whether parent or not is the issue. To prove it the mother is admitted as a witness. The inquiry whether about the time the child is alleged to have been begotten, and on the same day, the mother had not had criminal intercourse with others than the defendant, is most material as affecting the question of the paternity of the child.(*f*) The fact is one within her knowledge,—material, relevant, yet the mother is excused from answering it lest it might criminate herself. It is the privilege of unchastity—conceded to unchastity at the expense of justice. But the offence of criminal intercourse is one of secrecy.(*g*) If the mother and her paramour are both

(*e*) Southard v. Rexford, 6 Cowan, 254.

(*f*) Tillson v. Bowley, 8 Greenl. 163. Low v. Mitchell, 18 Maine, 374.

(*g*) By the Mahometan law, the more secret the offence the greater the amount of proof required. In case of adultery four witnesses are necessary for the conviction of the accused—while in case of murder, two are sufficient.

"La preuve de la cohabitation illicite * * ne s'acquiert et ne s'établit que par la déposition judiciaire de quatre témoins ayant les qualités voulues par la loi. * * Les quatre témoins doivent être parfaitement d'accord sur le moment et sur le lieu ou ils ont vu, &c., les coupables, et sur toutes les autres circonstances de détail

permitted to be silent, because answering would be unpleasant, from what source can the accused obtain proof. The guilty parties do not call witnesses to their shame.

The consideration or the want of consideration of the note in suit, is the question for judicial determination. The facts constitutive of the defence would show a failure of consideration of the note, or that it was fraudulently obtained, or that it was given in contravention of some statute, and is void by its provisions. No matter what the defence—it suffices that it is one the judge is bound to regard. The defence perfect, a witness is called who refuses to answer(*h*) because if he answered truly, his answer, while it would show a perfect defence, would disclose facts exposing the witness to a penalty for the violation of a statute, which might be used to his disadvantage in some possible suit hereafter to be commenced. The refusal of the witness receives the approval of the court, and the reason given, its sanction.

But the witness is compelled to answer notwithstanding his answer may expose him in a civil suit to pecuniary liability and loss, however great. But what is the exposure to a penalty or a forfeiture other than an exposure to pecuniary loss. To the reluctant witness, equally unwilling to admit his civil or his penal liability, what matters it in which form the loss may arise. The penalty if paid is but money. The forfeiture if enforced is but money or money's worth. What differs it whether the suit be debt or assumpsit, or trespass; upon a statutory indebtedness arising from violated law, upon a promise broken, or upon the wrongful acts of the defendant? The unwillingness to answer the same—the exposure to loss the same, what cares the witness whether he is exposed to liability for a penalty, a trespass, or a violated contract. The answer is required when the exposure of the witness is to pecuniary liability, arising from the non-performance of a contract or from the commission of a tort.(*i*) Is it more onerous to the witness to answer, because the liability to which he may thereby be exposed, is termed penal?(*k*) When

du fait." Jurisprudence Musulman, par Khalîl Ibn-Ish'âk' traduit de l'Arabe, par M. Perron, 5 tome, 237.

Nothing but the most earnest efforts on the part of an adulterer can ever secure his own conviction.

It is among the maxims of the civil law, that a virgin is to be believed in preference to a widow. "*Magis creditur virgini quam viduae.*" Farinacius, quest. 65, § 180. The common law, lest one not a virgin—yet a mother without being a wife or a widow,—should be disbelieved, or lest her tender sensibilities should be wounded, refuses to allow any questions, however necessary or important they may be, to be put, the answers to which would tend to criminate. By the civil law, chastity has its preference over widowhood. Unchastity, by the common law, has its privilege of freedom from interrogation.

(*h*) Bank of Salina v. Henry, 2 Denio, 156.

(*i*) Bull v. Loveland, 10 Pick. 9. Naylor v. Semmes, 4 Gill. & Johns. 273.

(*k*) During the trial of Lord Melville, before the House of Lords, (1806,) the opinion of the twelve judges was asked as to whether witnesses should be compelled to answer when their answers would expose them to pecuniary loss. Eight judges with the chancellor held that the answer of the witness should be given. Four thought otherwise. Mr. Justice Grose said, "that by the mild laws of this country, no man was bound to criminate himself, or to give evidence against his own pecuniary interest, and perhaps to his utter ruin." It was allowed that neither in courts of equity nor at law, was a man bound to answer what might expose him to penalty or forfeiture. He could not see the reason why a man should be ex-

judgments have been rendered for the tort and the penalty—the amounts in each case the same—is there any distinction between them? They are alike debts. No reason can be assigned, none exists, why in the one case the answer of a reluctant witness should be compelled, and in the other the refusal to answer should be permitted.

The defendant is on trial charged with the commission of a crime. He is innocent, but the circumstances proved tend to show his guilt. The proof is or may be sufficient for his conviction. He calls a witness, "who stated that he knew the respondent to be innocent, but that he could not state how he knew it without implicating himself, and inquired of the court if he was bound to testify at all," to which the court replied that he "would not be compelled to answer any question if the answer will *tend to expose* him to a criminal charge."(*l*) The innocent man is on trial. The proof of his innocence—the witness by whom it may be proved, is in court. Being guilty and reluctant to state the facts by which the innocence of the prisoner would be shown, he is excused from answering. It is the privilege of crime. Innocence is without sympathy, without privilege.

This exemption from testifying—this privilege of crime—extends alike to parties as to witnesses.(*m*) Courts of equity have special jurisdiction over cases of fraud and trust. The peculiar boast of equity jurisprudence is its power of extracting truth from the dishonest and the fraudulent. For this purpose it has its bill of relief and discovery and its bill of discovery in aid of a suit or defence at law. The defendant has defrauded the plaintiff. The contract sought to be enforced is without consideration, or in violation of law. The plaintiff seeks a discovery of the facts showing its invalidity or its criminality. The defendant has violated the provisions of a statute or committed a crime, and answering truly the interrogatories of the bill, his answer, while destructive of his unjust claim, would disclose facts tending perhaps to his future conviction. He therefore claims the privilege of not answering. The plaintiff if without discovery is without remedy. Whatever exonerates from answering exonerates from liability. The facts which constitute a bar to discovery, constitute a bar to relief. The possibly injurious tendency of a true answer to the criminal, excuses him from answering. But why should the defendant be suffered to defraud the plaintiff because he has committed a crime. Why should justice be denied the plaintiff because the defendant has violated the law. If the defendant were to

cused from answering questions which might expose to the penalty of five pounds for killing a hare, and yet be obliged to answer questions, which might expose him to ten thousand pounds in damages, or to lie in jail all his life if he should be unable to pay those damages."

Mr. Justice Rooke coincided with Mr. Justice Grose. "He mentioned an extreme hard case. It was that of Lord Keith, who by an answer he gave in an insurance case where he was called as a witness, subjected himself to an action in which £10,000 damages were given against him." 1 Hall, American Law Journal, 223. That Lord Keith answered truly is to be presumed. If the truth showed his liability, is it not rather a source of congratulation than of regret, that the judgment was rendered against him, it being just.

(*l*) The State v. K., 4 N. H. 562.

(*m*) Hare on Discovery, 131. Parkhurst v. Lowton, 2 Swanst. 215.

plead his own crime in bar of relief, the absurdity of such a plea would be obvious to all. But if it be a bar to discovery when discovery is essential to relief, wherein consists the difference?

In equity, when discovery is sought of a knave, his crime affords his best protection from answering. If the fraud be one not punishable by law, not exposing to penalty, he must answer. Let the fraud ripen into crime, and the magnitude of the crime is the security of the criminal.

If one has defrauded another he is unwilling to make restitution. If unwilling to make restitution, it would be hard for him to discover those facts upon proof of which he would be compelled to make it. It would be hard if the facts thus discovered should have a tendency to expose the dishonest party hereafter to penal liability. The party alleging such possible tendency is privileged from answering.

What seems never to have occurred, or if it occurred, seems never to have been deemed worthy of consideration, is the greater hardship which the party defrauded must suffer in the deprivation or denial of his rights in consequence of the privilege of silence thus accorded to the defrauding defendant. No matter what the claim—what the defence—the defendant successfully interposes his criminal conduct as a bar to justice—or to the delivery of that testimony—the discovery of those facts,—by which alone justice is attainable.

But the privilege of the witness—of the party—favorable to the dishonest—injurious to the honest litigant—prejudicial to the cause of justice—the extent of the evil may be limited by the rigor with which its allowance is restricted. The disastrous efficiency of the rule will depend in no slight degree upon the tribunal by which the criminative tendency of the answer is to be determined. "The rule of law is, that a man shall not be obliged to discover what may subject him to a penalty not what *must* only."(*n*) "It is sufficient that it have a tendency to prove such a result"(*o*) "either directly or eventually."(*p*) "It is difficult to say *how little* or *how much* is required, but this at least will satisfy the rule; if a party states circumstances, which on the face of them are not only consistent with the existence of the peril which he states, but which also render it *extremely probable* * * * or which render it possible,"(*q*) or "which constitutes a link in a chain of proof that is to affect him,"(*r*) "or would supply a link,"(*s*) "even though but a single link,"(*t*) "or which may furnish a step in the prosecution,"(*u*) "or which *however remotely* connected with the fact would have a tendency to prove guilt,"(*v*) "whether there be or be not a probability that the defendant may be indicted,"(*w*) or that there may be a prosecution, the party and the witness alike are entitled to protection.

(*n*) Per Lord Hardwicke, in Harrison v. Southcote, 1 Atk. 518.
(*o*) Per Sutherland, J., in Bellinger v. The People, 8 Wend. 595.
(*p*) Per Kent, Ch., in Livingston v. Tompkins, 4 Johns. Ch. 432.
(*q*) Per Lord Truro, in Short v. Mercier, 1 Eng. Law & Eq. 208.
(*r*) Per Lord Eldon, in Paxton v. Douglas, 19 Ves. 225.
(*s*) Per Marcy, J., in People v. Mather, 4 Wend. 230.
(*t*) Per Eastman, J., in Janvren v. Scammon, 9 Foster, 280.
(*u*) Per Lord Eldon, in Claridge v. Hoare, 14 Ves. 65.
(*v*) Per Lord Eldon, in Parkhurst v. Lowton, 2 Swanston, 215.
(*w*) Per Lord Chief Baron Alexander, in Maccalum v. Turton, 2 Y. & J. 183.

As there is no fact which may not constitute a "step" or a "link," which may not "directly or eventually," probably or possibly, expose or tend to expose a party or a witness, if guilty, to penal liability, so there is no fact however important, the disclosure of which the party or witness may not avoid by alleging such possible tendency. "As the rule is one always admitted to be of the greatest importance, it is a serious duty upon every judge who is called upon to act under the administration of the rule to see as far as he can, that it is not one of the occasions in which the party asks to *evade doing that* which justice requires, under pretence of the rule,"(x) it being very manifest that there are "very extensive opportunities for *evasion* of doing that which justice calls for, under pretence of the rule."(x) As not less than one hundred cases are to be found in the reports, in which the question was, whether the defendant was or not bound(y) to answer to any facts which may tend to criminate him or subject him to penalties or forfeitures, besides those at common law, where the same question has arisen as to witnesses, it would seem that the rule ought by this time to be definitely settled.

"If he (the witness) were obliged to show how the effect would be produced, the protection which this rule of law is designed to afford, would at once be annihilated."(z) Accordingly, "the witness must be allowed to *judge for himself*, though no doubt there may be some difficulty and possible inconvenience in the application of the rule."(a) If he *thinks*(b) it will tend to expose him hereafter to criminal liability, he will be excused from answering,(c) "unless the court can see that he is in error or that it is a mere pretext on the part of the witness to avoid answering, and that his answer cannot, from the nature of things, criminate him." So that the ultimate conclusion of the law would seem to be that whether the facts sought for shall be discovered, whether the questions proposed shall be answered, will depend upon what the party desirous of withholding shall *think* or shall say he thinks will be the probable or possible tendency of the facts withheld, unless the liability of the witness should be barred by the statute of limitations. The witness answers or not, as he chooses. His own good pleasure is the law of the case.(d)

The privilege is that of the witness. Commencing his answer and stating a fact or facts, he cannot stop midway when he perceives their criminative tendency.(e) The rule, a good one, it is difficult to per-

(x) Per Lord Truro, in Short v. Mercier, 1 Eng. L. & Eq. 208. 15 Jur. 93.

(y) Per Shadwell, V. C., in Green v. Weaver, 1 Simons, 404.

(z) 1 Greenl. Ev. § 451.

(a) Per Jarvis, C. J., in Fisher v. Ronalds, 12 C. B. 762. "But there are stronger opinions the other way," remarks Mr. Baron Parke, in Osborne v. London Dock Co., 29 Eng. Law & Eq. 380. People v. Mather, 4 Wend. 232. But although a witness is *his own judge* as to whether his answer is to criminate himself, he is nevertheless liable to the party for a refusal to testify if his refusal be wilful and his excuse false. Warner v. Lucas, 10 Ohio, 336. It would seem that if it be an error of judgment, the party requiring the answer is without remedy.

(b) Coles v. Hardacre, 3 Taunton, 424.

(c) Per Eastman, J., in Janvren v. Scammon, 9 Foster, 280. Coburn v. Odell 10 Foster, 540.

(d) Roberts v. Allatt, 1 M. & M. 192.

(e) If the witness voluntarily state a fact he is bound to state all he knows about

ceive why its allowance is not as proper in one stage of the inquiry as another.

The answer may tend to degrade the character of the witness—to show that he has suffered an ignominious punishment, and to expose him to obloquy and ill will. Shall he answer?

Certainly, if the inquiry be relevant and material to the issue. The answer may disgrace. But the truth of the answer may be assumed. The truth then will disgrace him. Why then should he not be disgraced.(*f*) It is the consequence of his own act, and his feelings should not be regarded in preference to the rights of the party inquiring. Without character(*g*) he should not be permitted to stand before the jury as if he had it. The trustworthiness of the witness depends upon his character. A sympathy for the feelings of the witness should not exempt him from disclosing any and all facts, which being competent and admissible, are material in enabling the jury to arrive at a correct decision.(*h*)

The result is, that there is no inquiry, which is material and relevant, which may not be proposed, and which being proposed should not be answered.

it, though in so doing he expose himself to a criminal charge. State v. K., 4 N. H. 562. If he disclose part he must the whole. Coburn v. Odell, 10 Foster, 540; Foster v. Pierce, 11 Cushing, 437; Chamberlain v. Willson, 12 Verm. 491; Low v. Mitchell, 18 Maine, 374. But in Cozzens v. Worrall, Buck. 531, Lord Eldon said, if a man has gone on answering questions he may stay whenever he chooses. In Garbett's case, 2 C. & K. 474, the court held "that the witness was entitled to his privilege at any stage of the inquiry."

In The King of The Two Sicilies v. Wilcox, 1 Simons, (N. S.) 310, the Court say, "he may stop at any time."

(*f*) By the Scottish law, a question tending to degrade and injure the character of a witness, though not to subject the witness to a criminal charge, is allowed to be put, the witness being previously told that it was *optional* to her to answer or not. King v. King, 4 D. 591.

The maxim has been received into our law, *Quod nemo tenetur jurare in suam turpitudinem.* Tait on Evidence, 427.

(*g*) "Every question on cross-examination of a witness," remarks Lord Abinger in Regina v. Overton, 1 C. & M. 655, "which goes to his credit, is material." But see Lohman v. People, 1 Comstock, 380.

(*h*) If the law should be changed so that the witness is required to disclose all facts, howsoever self criminative, such disclosures not to be used as evidence hereafter against him, in any criminal proceeding, it would be a great improvement upon the existing law.

CHAPTER XVI.

JUDICIAL OATHS.

It is a noticeable fact, that in the earliest stages of civilization the belief of the special interference of the Deity in the affairs of men, is a prevailing and all but universal idea. Man, it was thought, by certain mystic forms and hallowed ceremonies, could compel the interference of the Divinity either to establish innocence, or to detect guilt. Hence came ordeals and trials by battle and by lot; hence the belief that by the eating of bread, or the drinking of water, by walking barefoot over burning ploughshares, by thrusting the hand amid poisonous serpents, or throwing the accused, bound hand and foot, into the water, amid prayers and the imposing forms of antique superstition, God would manifest the truth by a miraculous violation of the laws of Nature. So extensively diffused was this idea, that it was alike believed by the polished Athenian on the banks of the Ilissus, the stern Israelite amid the hills of Judea, the African dwelling under the burning heat of the torrid zone, and the Scandinavian worshipper of Thor or Odin, amid the fastnesses of the North. All nations, barbarous, or just emerging from barbarism, have resorted to the Divinity for the decision of disputed questions with somewhat similar ceremonies, and undoubtedly with like success.

Part and parcel with ordeals, whether of bread or of water, of poisons or of ploughshares, whether of Grecian, Jewish, Hindoo, or Scandinavian form and origin, based upon the same principle, involving the same leading idea, is the oath by which divine vengeance is imprecated upon falsehood, and, by the use of which ceremony, if it be effective, the Deity is, specially and for that cause, bound to inflict the requisite and appropriate punishment, in case of its violation. As the analogies traceable amid the radical words of different languages all point to a common origin, —a primal language,—so the innumerable resemblances discernible amid the elemental forms of jurisprudence, among nations diverse in their local habitations, with varying customs, and sympathies, and languages, would equally seem to indicate a common source, from which, at some point of time, now uncertain or lost in the darkness of a remote antiquity, they originally sprung.

The oath,(*a*) either assertory or promissory, is found among all nations, with the exception of those so barbarous as to have no conception of the

(*a*) See Junkin on Oaths. Tyler on Oaths. Bentham's "Swear not at all."

existence of a God. Its antiquity seems almost coeval with man's existence. Indeed, according to classical mythology, its antiquity is still greater; for as the Gods and Goddesses swore more or less according to the emergency of the case, after, so it is fairly inferrible, that they did before his creation. At any rate, the custom reaches back to the earliest recorded history.

An oath is a religious asseveration, by which "we either renounce the mercy, or imprecate the vengeance of Heaven, if we speak not the truth." Oaths have usually been divided into promissory or oaths of office, and assertory or oaths uttered judicially or extrajudicially, for the purpose of compelling truth on the part of the witness, and enforcing belief on the part of the hearer.

So extravagantly profuse and wasteful is the use of oaths amongst us, so utterly at variance are they with the command, "Swear not at all," so powerless are they for all good, so potent for much evil, that we have thought it might not be uninteresting briefly to notice the purposes for which, and the occasions upon which they have been in use, their different forms and ceremonies, the various punishments for their violation, the theory which justifies and requires their adoption as a sanction for truth, and their real force and efficiency in the administration of judicial affairs.

In the earliest records of the Jews, we find not only oaths but the very form of the uplifted hand, which is every day witnessed in courts. It is the form adopted by the Deity: "I lift up my hand to Heaven and say, I live forever." To swear and to lift up the hand, are indifferently used as translations of the same Hebrew word. "The Lord lifted up His hand to the House of Israel," or "sware," as is subjoined in the margin. So in Revelations, "the angel which I saw, lifted up his hand to Heaven, and sware by him that liveth forever, who created Heaven and the things that therein are, and the sea and the things that therein are, that there should be time no longer."

The person to be sworn did not pronounce the formula, but the words of the oath were repeated to him, or, when heard, he ratified them by uttering the words "amen, amen;"—thus imprecating upon himself the curse. The most solemn oaths were taken amid sacrifices, the person who imposed the oath dividing the victim, and the person who took it passing between the divided parts, with an imprecation, expressed or understood, to the following import: "May God do to me if I am perjured, what has been done to these victims, or punish me still more, in proportion to his greater power."

The first instance of a judicial oath is to be found in Exodus, xxii. 10, 11; where, in case of the loss of animals, delivered by one to his neighbor to keep, and they die, or be hurt, or driven away, no man seeing it, it is decreed, that "then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbor's goods; and the owner of it shall accept thereof, and he shall not make it good."

Perjury, by the Mosaic law,(*b*) was not an offence against the civil law;

(*b*) 4 Michaelis Commentaries on the Laws of Moses, 93, 94.

to God alone was left its punishment. The civil magistrate had no jurisdiction of the offence, except in the case of a false charge of crime, when the punishment for the offence charged, was to be inflicted upon the person falsely charging it. The perjurer might expiate his guilt, by making the prescribed and pre-determined trespass offerings. The misunderstanding or misinterpretation of this, may in later times have led to the doctrines of absolution, and the sale of indulgences; for it is difficult to perceive much difference in principle, whether the offerings, made to escape the punishment of the Deity, be in certain specific articles, or in certain money payments.

The form among the Greeks was by lifting up the hand to Heaven, or touching the altar, adding a solemn imprecation to their oaths, for the satisfaction of the person by whom the oath was imposed, as well as to lay a more inviolable obligation upon the person taking it—in terms something like this:—if what I swear be true, may I enjoy much happiness, if not, may I utterly perish.

In judicial proceedings, the oath was administered to the witnesses before an altar erected in the courts of judicature, and with the greatest solemnity. The parties were likewise sworn—the plaintiff, that he would make no false charge, the defendant, that he would answer truly to the charge preferred.

An ancient form among the Romans was, for the juror to hold a stone in his hand, and to imprecate a curse upon himself should he swear falsely, in these words: "If I knowingly deceive, whilst He saves the city and citadel, may Jupiter cast me away from all that is good, as I do this stone." Among the Greeks and Romans, the oath was not merely used to induce faith in judicial proceedings, but the Gods were invoked as witnesses to contracts between individuals, and treaties between nations.

When the shrine of Jupiter gave place to that of St. Peter, when the innumerable gods and goddesses of ancient superstition were converted into the equally numberless saints and saintesses of Catholicism, when the Pontifex Maximus of consular and imperial, became the Pontifex Maximus of papal Rome—without even the change of his sacerdotal vestments, when the rites and ceremonies, the whole ritual of the pagan worship was transferred bodily to the worship of the papacy, the oath, which was essentially a religious ceremony, was adopted as it had heretofore been administered, except so far as was required by the alteration in the names of the object of worship, and in its purposes and beliefs. As before this change, the altar, or the sacred things upon it were touched or kissed, as the more gods one swore by the stronger the oath, so we find after this change similar forms and ceremonies were adopted, with slight variations. The very form of the imprecation used is of pagan origin. "So help me Jupiter and these sacred things," became "So help me God and these sacred relics, or, "these holy Evangelists."(c) The Flamen of Jupiter, from the sacredness of his office, was not compelled to take an oath, and the word of the priest, "verbum sacerdotis," in conformity to the old superstition, has sufficed.

(c) "So help me Freyre Njord and the Almighty, as I shall testify truly, &c.," was the Scandinavian formula.

Justinian prescribes the following form:—"I swear by God Almighty and by his only begotten Son, our Lord Jesus Christ, by the Holy Ghost and by the glorious St. Mary, mother of God, and always a virgin, and by the Four Gospels, which I hold in my hand, and by the holy Archangels, Michael and Gabriel, &c.," closing with an imprecation upon his head of the "terrible judgment of God and Christ, our Saviour, and that he might have part with Judas and the leper Gehazi, and that the curse of Cain might be upon him."

Besides oaths on solemn and judicial occasions, the ancients were in the habit of making use of them, as nowadays, as "the supplemental ornament of speech"—"as expletives to plump the speech, and fill up sentences;"—swearing by the patron Divinities of their cities, as in later days by patron saints; by all manner of beasts and creeping things, by the fishes of the sea, and by stones and mountains.

Per Solis radios, Tarpeiaque fulmina jurat,
Et Martis frameam, et Cirrhæi spicula Vatis;
Per calamos Venatricis pharetramque Puellæ,
Perque tuum, pater Ægæi Neptune, tridentem;
Addit et Herculeos arcus, hastamque Minervæ,
Quidquid habent telorum armamentaria cœli.

Indeed, the world-famous "God damn," of the English is but a translation of the "*dii me perdant*" of classical antiquity. But the oaths of antiquity, however absurd or ridiculous, were infinitely exceeded in absurdity by the exuberant and grotesque profaneness of the Christians of the middle ages. They swore by "Sion and Mount Sinai," "by St. James' Lance," "by the brightness of God," "by Christ's foot," "by nails and by blood," "by God's arms two,"—they swore

"By the saintly bones and relics,
Scattered through the wide arena;
Yea, the holy coat of Jesus,
And the foot of Magdalena."

Menu, the great lawgiver of the East, the son of the Self-existent, as he is termed in the sacred books of the Hindoos, ordains that the judge, having assembled the witnesses in the court, should, in the presence of the plaintiff and defendant, address them as follows:—(*c*)

"What ye know to have been transacted in the matter before us, between the parties reciprocally, declare at large and with truth, for your evidence is required. . . .

"The witness who speaks falsely, shall be fast bound under water, in the snaky cords of Varuna, and he shall be wholly deprived of power to escape torment during a hundred transmigrations; let mankind give, therefore, no false testimony.

"Naked and shorn, tormented with hunger and thirst, and deprived of sight, shall the man who gives false testimony go, with a potsherd to beg bread at the door of his enemy. Headlong and in utter darkness, shall the impious wretch tumble into hell, who, being interrogated in a judicial inquiry, answers one question falsely.

"The priest must be sworn by his veracity; the soldier by his horse, or elephant, or weapons; the merchant by his kine, grain and gold; the

(*c*) Institutes of Menu, c. 8, §§ 82, 83, &c.

mechanic, or servile man, by imprecating on his head, if he speak falsely, all possible crimes."

In this code, the guilt of perjury varies in intensity, according to the subject matter of testimony.

"By false testimony concerning cattle in general, the witness incurs the guilt of killing five men; he kills ten by false testimony concerning kine; he kills a hundred by false testimony concerning horses; and a thousand by false testimony concerning the human race."

But what is human life compared with gold, or with land? The scale rises,—the atrocity increases.

"By speaking falsely in a cause concerning gold, he kills, or incurs the guilt of killing, the born and unborn; by speaking falsely concerning land, he kills every thing animated. Beware, then, of speaking falsely concerning land. Marking well all the murders which are comprehended in the crime of perjury—declare the whole truth, as it was heard and as it was seen by thee."

Notwithstanding all this, pious falsehood, for instance, perjury to save life, which would be forfeited by the rigor of the law, is not merely allowed, but approved, and eulogistically termed "the speech of the Gods."(*d*)

"To a woman, on a proposal of marriage, in the case of grass or fruit eaten by a cow, of wood taken for a sacrifice, or of a promise made for the preservation of a Brahmin, it is no deadly sin to take a slight oath."

Ever famous has been the lubricity of lovers' oaths. The lover swore, indeed, but, as was said by the Greeks, oaths made in love, never enter into the ears of the Gods. This, probably, is the only code not only allowing and approving falsehood by lovers, but by others.

Various are the modes of administering an oath. A cow is sometimes brought into court, that the witness may have the satisfaction of swearing with her tail in his hand; the leaf of the sweet basil and the waters of the Ganges are swallowed; the witness holds fire, or touches the head of his children or wife—while the less orthodox followers of Brahmin, those of the Jungle tribes, impressed with the belief that if they swear falsely they shall be food for tigers, are sworn on the skin of one.

Among the Mohammedans, the oath is administered with the Koran on the head of the witness; but it is not binding unless taken in the express name of the Almighty, and then it is incomplete unless the witness, after having given in his evidence, again swears that he has spoken nothing but the truth. The oath is not worthy of credit unless taken in the name of God; and the swearer must corroborate it by reciting the attributes of God, as, "I swear by the God besides whom there is no other righteous God, who is acquainted with what is hidden," &c.

No one, who has read the inimitable works of Sterne, will forget the all-cursing excommunication of the Catholic Church—cursing the unhappy offender in the exercise of every function of living nature, and through all the joints and articulations of his members, from the crown

(*d*) "In some cases, a giver of false evidence from a pious motive, even though he knew the truth, shall not lose a seat in heaven. Such evidence wise men call the speech of the Gods." Institutes of Menu, c. 8, § 103.

of his head to the sole of his foot. The oath of the Burmese, though falling infinitely short as an effusion of maledictory imprecation, is still worthy of being brought to mind.

"I will spreak the truth. If I speak not the truth, may it be through the influence of the laws of demerit, viz: passion, anger, folly, pride, false opinion, hardheartedness, and scepticism; so that when I and my relations are on land, land animals, as tigers, elephants, buffaloes, poisonous serpents, scorpions, &c., shall seize, crush, and bite us, so that we shall certainly die. Let calamities occasioned by fire, water, rulers, thieves and enemies, oppress and destroy us, till we come to utter destruction. Let me be subject to all the calamities that are within the body, and all that are without the body. May we be seized with madness, dumbness, blindness, leprosy and hydrophobia. May we be struck with thunderbolts, and lightning, and come to sudden death. In the midst of not speaking truth, may I be taken with vomiting black clotted blood, and suddenly die before the assembled people. When I am going by water, may the aquatic genii assault me, the boat be upset, and the property lost; and may alligators, porpoises, sharks, or other sea-monsters seize and crush me to death; and when I change worlds, may I not arrive among men and nats, but suffer unmixed punishment and regret in the utmost wretchedness among the four states of punishment, Hell, Prita, Beasts and Athurakai," &c.

"'Small curses, Dr. Slop, upon great occasions,' quoth my father, 'are but so much waste of our strength and soul's health, to no manner of purpose.' 'I own it,' replied Dr. Slop. 'They are like sparrow shot,' quoth my uncle Toby, 'fired against a bastion.' 'They serve,' continued my father, 'to stir the humors—but carry off none of their acrimony—for my part, I seldom swear or curse at all. I hold it bad; but if I fall into it by surprise, I generally retain so much presence of mind as to make it answer my purpose—that is, I swear till I find myself easy.'" The Burmese, at any rate, fire no sparrow shot at falsehood—and might be easy in the sufficiency of the metal with which their oath is loaded.

Much of the judicial proceedings of our Anglo-Saxon ancestors rested upon oaths, and the punishment for their violation was severe. The perjurer was declared unworthy of the ordeal, was incompetent as a witness, denied Christian burial, and classed with witches, murderers and the most obnoxious members of society.

Oaths were administered to the complainant in criminal proceedings, and to the accused. The oath of the complainant was as follows: "In the Lord, I accuse not N. either from hate, or art, or unjust avarice, nor do I know any thing more true; but so my mind said to me, and I myself tell for truth that he was the thief of my goods."

The accused swore as follows: "In the Lord, I am innocent, both in word and deed, of that charge of which P. accused me."

The oath of the witness was: "In the name of Almighty God, as I stand here a true witness, unbidden and unbought, so I oversaw it with mine eyes, and even heard it in my ears, what I have said."

From this, it would appear that, in those early days, before the inveterate chicanery of Norman Jurisprudence had cursed English soil, that

it was usual to swear the parties,—those who know something about the matter.

The different oaths of modern Europe, ordeal oaths, oaths of compurgators, decisory oaths, oaths of calumny, oaths military, masonic, might well deserve attention; but we have already, perhaps, occupied too much attention in reverting to the forms and usages of the past.(*d*)

There are but two instances of nations among whom oaths have not been adopted in judicial proceedings. Among the Chinese, no oath is exacted by the magistrate, upon the delivery of testimony. When they question each other's testimony, appeals to the Gods are only made by cutting off the head of a fowl and wishing they may thus suffer—or blowing out a candle and wishing they may thus be extinguished, if they do not speak the truth. The other instance is to be found in the code of laws formed, with great judgment and much discrimination, by the missionaries at Tahiti—where, we believe, oaths have, for the first time, been abolished by a Christian people.(*e*)

Whim and caprice seem to have governed men in selecting the punishment to be inflicted for a violation of the truth. Among some nations, fines, confiscation of goods, and imprisonment have sufficed. The Hindoos, cut out the tongue, as being the offending member, while the Spaniards, sparing the tongue, extracted the teeth, for their share in the formation of sound. Some cut off the hand. The old Germans were content with a thumb, while the Danes, using three fingers in the ceremony, were content with taking only two; and the Dutch, still more merciful, thought the jointing of the forefinger a sufficient expiation for the offence. By the Salic law, a fine of fifteen shillings satisfied the offended majesty of the law; but in case of the decisory oath, according to the laws of some countries, no punishment can be imposed on the false swearer beyond what God will inflict.(*f*)

With us, the oath is used on so many occasions, that a stranger would imagine it was a precept of our religion, to swear always, at all times and on all occasions. Not an executive officer, from the President to a Marshal, from a Governor to a Constable; not a judicial officer, from the chief justice to the lowest magistrate known to the law; not a member of our numerous legislative assemblies; not an officer of the army or navy, nor a soldier or sailor, enlisting, but is sworn in certain set and prescribed formulas. A sworn assessor is required to assess our taxes; a sworn collector to collect, and a sworn treasurer to receive the money collected. Not a lot of land is levied upon, without the intervention of oaths. The whole custom house department is rife with them. Through all the in-

(*d*) The Roman law dominates over the civilization of continental Europe. It is found to control in no slight degree Mussulman jurisprudence. The various kinds of judicial oaths are strikingly similar in the civil and Mahometan law. Compare 10 Toullier, Droit Civil Français, ch. vi., sec. v., Du Serment, with Jurisprudence Musulmane, 5 tome, 265, Du Serment supplétif, dans le case de témoignage isolé, 323, Du Serment judiciaire.

For the oaths of compurgators, see Tyler on Oaths, 263; for the ordeal oaths, p. 272. 5 Jurisprudence Musulmane, 460, Du Serment cinquantenaire.

(*e*) "No oath is administered on any occasion; deliberate assertion is regarded as evidence, and false evidence is regarded as equally criminal with false accusation, and is, I believe, punished accordingly." 3 Ellis, Polynesian Researches, 150.

(*f*) Tyler on Oaths.

numerable gradations of life, official, civil, military, executive and judicial, the oath is the established security, by which, in their respective spheres, they are all bound to the performance of their several duties—and that, too, by a people, one of the clearest precepts of whose religion is, "swear not at all;" and when, in many of the above instances, the violation of the several duties sworn to be done and performed, is not punishable as perjury.

Nor are these the only occasions in which the oath is used. No testimony is received in any judicial proceeding until after its administration. As a security for official faithfulness, or as a preventive of official delinquency, it is notoriously worthless and inoperative. What may be its value in the preserving and promoting of trustworthiness of testimony, we propose to consider.

For the purposes of Justice, it is perfectly immaterial whether the testimony uttered be sworn or unsworn, provided it be true. Before considering the supposed efficiency of an oath, it may be advisable to see what other, and how powerful securities for testimonial veracity are attainable without resort to this supernatural agency.

Truth is the natural language of all; it is the general rule, falsehood the rare and occasional exception. Even of those least regardful of veracity, truth is the ordinary and common language. The greatest liar, no matter how depraved he may be, usually speaks the truth. And why? Invention is the work of labor. To narrate facts in the order of their occurrence, to tell what has been seen or heard, is what obviously occurs to any one. To avoid doing this, is a work of difficulty. Falsely to add to what has occured, carefully to insert a dexterous lie, requires ingenuity, greater or less, according to the greater or less degree of skill with which the lie is dovetailed among the truths which surround it. No matter how cunning the artificer, the web cannot be so woven that the stained and colored thread shall not be perceived. Love of ease, fear of labor, the physical sanction, are always seen coöperating in favor of truth. Any motive, however slight and even infinitesimal, is, or may be sufficient to induce action in a right direction, except when overborne by other and superior motives, in a sinister direction. By a sort of impulse, by the very course of nature, the usual tendency of speech is in the line of truth.

Regard for public opinion, the pain and shame universally attendant upon the ignominy attached to falsehood detected, the disgrace of the liar, in other words, the moral and popular sanction, with but rare and accidental exceptions, is found tending in the same direction. Much the greater part of what is known, is known only from the testimony of others. Our necessities, the necessities of others, and of social intercourse, require, that for our own preservation as well as for that of others, the truth should be told. Hence among all nations, barbarous and civilized, and among civilized in proportion to their advancement, the term Liar has been one of deep reproach; never used without inflicting pain on the person to whom it is applied. However great the disgrace, it is immeasurably increased, when the occasion upon which the falsehood is uttered is a judicial one. The more important the occasion, the greater the public indignation and scorn attached to its violation.

The law regarding veracity, which is peculiarly desirable in judicial investigations, may impose severe penalties for false testimony,—mendacity,—penalties varying in degree of severity, according to the aggravation of the offence—and thus may furnish additional sanction to, and security for testimonial trusworthiness.

It may happen that the statement of a witness, while true in part, may be defective in detail, either by the omission of true, or the utterance of false facts. Correctness and completeness are both included in perfect veracity. Incorrect in part, incomplete to any material extent,—the evils of such incompleteness and incorrectness, when not the result of design, may be as great as those of deliberate and intentional falsehood. How best to attain those indispensable requisites, is the problem, the solution of which becomes so important in the practical administration of the law. How best to compel the reluctant and evasive witness, how to quicken the careless and indifferent, how to check and restrain the rash and presumptuous, how convict the deliberately and wilfully false, how to extort from reluctant lips the truth, the whole truth, and nothing but the truth—by what processes to accomplish these results, is the great question.

Interrogation and cross-interrogation, rigid, severe and scrutinizing, under a proper system of procedure, confirmed and strengthened by the sanctions already alluded to, are the securities upon which all real and substantial reliance must be placed. The ordinary motives to veracity, without the aid of cross-examination, and unaccompanied by fear of punishment in case of falsehood, are found sufficient in the common affairs of life to produce veracity. The extraordinary securities afforded by punishment, compulsory examinations and cross-examinations, would seem to suffice in the case of evidence judicially delivered.

As, however, testimony is judicially delivered only upon and after the ceremony called an oath—it is only punishable if false, after the oath has been legally administered. This is not necessarily so—for, if the legislature should so will, the temporal punishment might as well be inflicted without, as with an oath.

Having briefly considered the temporal securities for truth, it now remains, to ascertain the real significance and true value of the oath, as a preventive of testimonial mendacity.

"What is universally understood by an oath," says Lord Hardwick, "is, that the person who undertakes, imprecates the vengence of God upon himself, if the oath he takes be false."

"An oath," says Michaëlis,(e) "is an appeal to God as a surety and the punisher of perjury; which appeal *as He accepted*, He of course became bound to punish a perjured person irremissibly.

"Were not God to take upon Himself to *guarantee oaths*, an appeal to Him in swearing, would be foolish and sinful. He *undertakes to guarantee it*, and is the avenger of perjury, if not in this world, *at any rate in the world to come.*"

By the use, then, of this ceremony, the Deity is engaged, or it is assumed that He is engaged, in case of a violation of the oath, to inflict punishment of an uncertain and indefinite degree of intensity—at some

(e) Commentaries on laws of Moses, 4 vol. p. 99, § 256.

remote period of time, in some indefinite place, according to the varying and conflicting theological notions of those holding this belief—notions varying according to the time when, and place where, they are entertained, and the education and character of those entertaining them.

It cannot be questioned, that the Deity will punish for falsehood, whether judicially or extrajudicially uttered; nor that such punishment, whatever it may be, whensoever, wheresoever, or howsoever inflicted, will be just, fitting and appropriate.

Were the ceremony not used, were unsworn testimony delivered, subject to temporal punishment, were all oaths abolished, false testimony, so far as this world is concerned, would be as injurious as if uttered under the sanction of an oath. The injurious effects in the administration of justice, would be the same. The unsworn witness would be amenable to the penalties of the law, as the sworn witness is now.

Now what is accomplished by the oath? The falsehood and its disastrous effects to the cause of justice are the same, whether the oath has been taken or not; the temporal punishment is, or may be made the same. The oath, if effective, therefore, is only effective so far as future punishment is concerned, which, in consequence of its administration, will thereby be increased or diminished,—for, if the future punishment were to remain the same, then nothing would have been effected; the oath would be a mere idle ceremony—*telumque imbelle sine ictu.*

That punishment hereafter will thereby be diminished, no one will pretend, certainly not those who repose confidence in the efficacy of this sanction. If it be increased, then, and then only is the ceremony effective—then, only, is a valid reason given for its adoption.

The falsehood being the same, whether the testimony be sworn or unsworn, the punishment for the falsehood itself, must necessarily be the same. For, if falsehood be a proper subject of punishment, when the effects are the same, the lie will be punished without, as well as with any ceremony preparatory to its utterance. If, then, an increase of punishment will be inflicted—it must be for the profanation of the ceremony, and nothing else.

If the future punishment is increased in consequence of the administration of the oath—then what follows? That man by the use of certain words and ceremonies, can compel the Deity to inflict other, and increased, and different punishments; that man can control the Deity. The punishment for the falsehood is one thing; the punishment for the falehood would be just without the ceremony, and the falsehood being the same, the punishment, for that cause, must be the same. If there be an increase, it is for the profanation, and for that alone.

The perjury committed, the falsehood judicially uttered, as by the Quaker, the temporal punishment the same, the evil the same, is the future punishment the same? If so, then the oath is utterly valueless. Is it increased? Then, for precisely the same temporal offence, for the same identical violation of truth, there is a different future punishment, and that arising from, and caused by the utterance of certain words, and the performance of certain gestures, previous to uttering such falsehood! The Quaker suffers equally in this world for his crime, but hereafter he is to be a gainer by having his suffering diminished.

All that is alleged, then, to have been accomplished is, that an increased amount of punishment is hereafter to be inflicted, simply for the violation of a ceremony, and entirely irrespective and regardless of any evils flowing from the falsehood. No sanction for truth is really obtained.

But in what does the binding force of an oath consist? When Jepthah, returning in triumph, was met by his daughter with timbrels and dances, was Jepthah under any obligation to perform the vow he had made, "to offer up for a burnt offering whatsoever should come forth from the doors of his house to meet him?" If yea, such obligation arose not from the rightfulness or propriety of the matter vowed, for that was a dark and atrocious murder, "for she was his only child; besides her he had neither son nor daughter."(e) The performance, if required, was required solely in consequence of the vow. "For I have opened my mouth to the Lord, and cannot go back." If nay, if the vow was not to be performed, then does it not follow, that it is the fitness of the thing sworn to be done or not, which is the basis of the obligation, and upon which its binding force rests?

When Herod, pleased with the dancing of the daughter of Herodias, "promised with an oath to give her whatsoever she would," and when she requested the head of John the Baptist in a charger, was he thereby bound to give it her? "Yet for his oath's sake and them that sat with him at meat, he commanded it to be given her."

Mahomet says when you swear to do a thing, and afterwards find it better to do otherwise, do that which is better, and make void your oath.

The very definitions of an oath show that, by reason and in consequence of the oath, the Deity becomes bound to punish a perjured person irremissibly. History, too, shows that obligations upon man, and so, too, upon the Deity, arising from the oath, varied, or were supposed to vary in intensity, according to the changing forms and circumstances attendant upon its administration. When Robert, the pious king of France, abstracted the holy relics from the cases upon which the oath was taken, and substituted therefor the egg of an ostrich, as being an innocent object, and incapable of taking vengeance on those who should swear falsely, he might have been correct as to the incapacity of the egg; but did he thereby save his subjects from perjury, or avert the punishment of the Deity. When Harold shuddering saw the bones and relics of saints and martyrs, real or fictitious, upon which he had unconsciously sworn, were the obligations he had assumed, increased by their unknown presence? Or was it the unreasoning fear of abject superstition, which led him to believe that he had thus immeasurably increased the dangers of superhuman punishment?

Indeed, when men consider they are under obligation to utter the truth or not, as they stand upon a tiger's skin or hold in their hand the tail of a cow, as they have their hat on or off, as certain spurious relics of fictitious saints are enclosed in the pyx or not; as the lips touch the thumb or the book; as the book has, or not, a cross upon it, who does not see that the virtue resides, or is considered by those thus believing, to reside in the ceremony and in that alone; that the thing sworn to be

(e) Judges, chap. xi., v. 34.

done or not done, and its propriety, are not even matters deemed worthy of thought?

But is the obligation to utter truth thereby increased? Is not that eternal, immutable? Is not the duty to utter truth paramount and prior to all oaths? The oath may be the same so far as the ceremony is concerned, either to utter the truth or a falsehood, but is the obligation the same? If the obligation rests on the oath, each alike must be performed as sworn. If it rests on the rightfulness of the thing to be done, then why add the oath?

The oath is not without its accompanying evils. By imposing punishment only when it has been administered, it lessens the importance of, and the respect due to truth, in statements uttered extrajudicially, and gives an implied license to falsehood, out of court. The truth seems only to be specially requisite in case of an oath, otherwise it is comparatively immaterial.

Charles Lamb, in his quaint and quiet way, and with great humor and truth, says, "the custom of resorting to an oath in extreme cases, is apt to introduce into the laxer sort of minds, the notion of two kinds of truth; the one applicable to the solemn affairs of Justice, and the other to the common proceedings of daily intercourse. As truth, bound upon the conscience by an oath, can be but truth, so, in the common affirmations of the shop and the market, a latitude is expected and conceded upon questions wanting this solemn covenant. Something less than the truth satisfies. It is common for a person to say, you do not expect me to speak as if I were upon my oath. Hence, a kind of secondary or laic truth is tolerated, when clergy truth, oath truth, is not required. A Quaker knows none of these distinctions."

Not very dissimilar was the idea of St. Basil, that "it is a very foul and silly thing for a man to accuse himself as unworthy of belief, and to proffer an oath for security."

The oath, too, is a disturbing force in giving the just degree of weight to testimony. It tends to place all testimony upon the same level, to cause equal credence to be given to all, because all have passed through the same ceremony. The attention of the jury or the judge, is withdrawn from the just appreciation of the grounds of belief or disbelief in the evidence. The same ceremony for all, the tendency is, to believe that its force is the same upon all, and thus the bad receive undue credence, while the good are reduced to the standard of the bad.

In what does the difference consist between judicial and extrajudicial falsehood? The consequences of the latter may be more or less injurious than those of the former; the injury greater, the loss, in the latter case, of property, reputation or even life, in the former of a few shillings, it may be; is the falsehood judicially uttered the greater offence? To suffer the same loss by the utterance of the same words in court or out of court, in the street or on the stand, with or without assenting with upraised hand to certain words, in what is the difference to the loser, or the general injury to the community? Why in one case punish, in the other exempt from punishment? Does it not degrade the general standard of veracity; does it not create the notion that truth is not expected on ordinary occasions, but is only required as a sort of court language?

What are the lessons of experience? To determine the real value of this sanction, one must abstract all those concurring and co-operating securities, which alone are of real importance, but which, not being estimated at their value, give this an unnatural and undeserved efficiency. Take away public opinion; let falsehood be regarded with as much indifference as among the Hindoos; remove all fear of temporal punishment in case of testimonial falsehood; abolish the test of cross-examination; leave it to the willing or unwilling witness to state more or less, according to the promptings of his inclination, and you then see the measure of security for trustworthiness derivable from the oath. When the oath sanction is in accordance with the other securities of trustworthiness, its weakness is not perceived. Let the religious cease to be in conformity with the popular sentiment or even with convenience, and its violation is looked on with indifference or even complacency. "If you wish," says Bentham, "to have powder of post taken for an efficacious medicine, try it with opium and antimony; if you wish to have it taken for what it is, try it by itself."

Definite, certain, immediate punishment alone is powerful to restrain or coerce. The future, enshrouded in darkness, yields to the present. The fear of punishment, hereafter to be imposed for falsehood without oath, or with oaths so far as it may be increased thereby, is a motive of little strength. The uncertainty whether any will be inflicted, the unalterable ignorance as to what the amount may be, or when in time, or where in space it is to be inflicted, render it a security unreliable and powerless in its action upon even the most intelligent and conscientious, when unaided and unsupported by other sanctions.

The oaths of Oxford University have been taken by the most cultivated minds of England, by those, who in after life attained the highest dignities of the Church or the State, by those, who from their station, their education and intelligence, would be least likely to disregard their obligation. These oaths required obedience to statutes framed centuries ago by and for a set of monks, and are about as consonant to the present state of society as the monkish costume would be to a General in Chief at the head of his army. Consequently, they are not merely not observed, but their observance would be a matter of astonishment to all, equally to those sworn to observe and to those sworn to require their observance.

Another instance of habitual violation of oaths, has been seen in the conduct of English judges and juries, in the administration of the criminal law. The English code was written in blood. Draco would have shuddered at the multiplicity of its bloody enactments. Death was inflicted in cases of larceny, dependent upon the value of the thing stolen. With greater regard to the dictates of humanity than to their oath-obligations, juries, at the suggestion of the Court, and for the express purpose of evading the law, have intentionally returned the article stolen as of less than its true value, to avoid the punishment of death, which otherwise would have been the penalty in case of conviction.

Unanimity, too, is required in juries. A difference of opinion exists; in most contested cases of much complexity, it is likely to exist. The really dissenting minority yield to the majority. The court aid or advise,

and if advice will not serve, compel agreements by partial starvation—thus bringing physical wants to their aid, to coerce real opinion.

The open and profligate violation of custom-house oaths, has attracted so much attention, that in England they have been abolished. In this country, a bill to that effect, with the approbation of the late John Quincy Adams, was introduced, but we believe it was defeated.

The Jews had no temporal punishment for perjury, and they have descended to posterity as a nation of oath-breakers. It will be fully understood how little effect the fear of future punishment had over the Grecian mind,(*e*) when it is remembered that the wit of Aristophanes was directed against the very idea of Jove's interference for the punishment of this crime.

"Dunce, dotard, were you born before the flood,
To talk of perjury, whilst Simon breathes,
Theorus and Kleonymus, whilst they,
The perjured villians, brave the lightning's stroke,
And gaze the heavens unshact, would these escape?
Why, man, Jove's random fires strike his own fane,
Strike Sunium's guiltless top, strike the dumb Oak,
Who never yet broke faith or falsely swore."

The caustic and vehement pen of Juvenal affords an equally true and vivid picture of Roman want of belief and truth.

"Who dreams that oaths are sacred; that the shrine
Of every God has something of divine;
Dreams of Old Times, when Saturn first forsook
His diadem, and grasped the reaper's hook;
When Juno was a spinster, and when Jove
Lived still in private, in the Idean Grove!
Oh Golden times! When Gods were scarce and few,
And not as now, a mix'd and motley crew!
Wheels, furies, vultures, quite unheard of things,
And the gay ghosts, were strangers yet to kings."

The habitual disregard for truth—the little security which the oath gives to testimony—induced a committee of the British Parliament,(*f*)

(*e*) The Greeks, according to Cicero, seem habitually to have disregarded the obligations of an oath. "Græcus testis cum ea voluntate processit, ut lædat; *non jurisjurandi*, sed laedendi verba meditatur * * Num illos item putatis? *quibus jusjurandum jocus est:* testimonium ludus; existimatio vestra tenebrae; laus, merces, gratia, gratulatio proposita est omnis in impudenti mendacio." Oratio pro L. Flacco.

(*f*) Report in affairs of the East India Company, part IV., Judicial, to the House of Commons, 1832. "The great cause of failure in the administration of criminal as well as civil cases, is the habitual disregard for truth which unhappily pervades the bulk of the native community, and the little security which the obligation of an oath adds to the testimony of witnesses.

"False testimony is in certain cases directly encouraged and approved by the sanctity of the great lawgiver of the Hindoos, and the offence of perjury can be expiated by very easy penances. Under these circumstances, the inhabitants of India generally must undergo a great moral regeneration, before an evil, which saps the very foundations of justice, and bars all confidences between man and man, can be effectually remedied. This subject has been very fully and ably treated in a presentment made by the grand jury of Calcutta to the Supreme court, in the fourth term of 1823, and the expediency of abolishing oaths, as connected with native evidence, has been forcibly urged.

"Our own impression is, that generally speaking, the moral sanction of an oath does not (especially among the lower classes,) materially add to the value of native testimony, whether of Hindoos or Mahomedans; that the practical restraint on perjury is the dread of the punishment prescribed by law for that offence, and that the fear of consequences in a future state, or the apprehended loss of character and reputation among their countrymen, has little effect upon the great majo-

in their report on the judicial affairs of British India, to recommend its abolition, on the ground that its moral sanction does not add to the value of native testimony, Hindoo or Mahommedan; that the only practical restraint on perjury is the fear of punishment, imposed by law for that offence, and that the fear of consequences in a future state, or the loss of character or reputation among their own countrymen, has little effect upon the great majority of the people, in securing true and honest testimony, when they may be influenced by the bias of fear, favor, affection, or reward.

The legal exclusion consequent upon, and caused by the oath, affords an unanswerable argument against its use. Most nations, in the spirit of religious bigotry and barbarian exclusiveness, so characteristic of unenlightened legislation, have excluded as witnesses, those whose faith differed from their own. The Government, determining what shall be the faith,—decrees that all dissidents shall be branded as infidels. The term infidel expresses merely dissent or disbelief, without reference to the truth or falsehood of the thing disbelieved. It is the epithet which majorities apply to minorities, and, consequently, one of reproach. Justinian excluded infidels. Hindoos and Mahommedans excluded Christians, because of their infidelity, and, by way of reprisal, they in their turn were excluded by Christians, for the same cause. Such was the common law, as drawn from its purest fountains,—from Fleta and Bracton. Coke, its great expounder, excludes them as unworthy of credit; for, said he—they are perpetual enemies—"for as between them, as with the devils, whose subjects they are, and Christians, there is perpetual hostility, and can be no peace; for, as the Apostle said, 'and what concord hath Christ with Belial, or what part hath he that believeth with an infidel?'"

It was not until the East India Company commenced that splendid career of conquest, by which they acquired dominion over millions of subjects, and it was seen that an urgent necessity required the testimony of the natives—that the Court, overruling the well established law of ages, threw Bracton and Fleta overboard, because they were papists, and because in their day "little trade was carried on but the trade in religion;" and in the suit of Omichund,(*g*) the great Hindoo Banker, whose melancholy fate reflects little credit on British faith, against Barker, by an act of judge-made law decided that all infidels, without reference to their religion, might be received and sworn, according to the customs of their respective countries;—not because such was the law—but because to exclude them, would be a "most impolitic notion, and would tend at once to destroy all trade and commerce." Even judicial optics, with dim and beclouded vision, saw that, if the whole population of a country were excluded as infidels, proof might be deficient;—but, as it was thought to "the advantage of the nation to carry on trade and commerce in foreign countries, and in many countries inhabited by heathens," it

rity of the people, in securing true and honest testimony, when they may be influenced by the bias of fear, favor, affection or reward.

"With these impressions we should have no objection to try the experiment of dispensing with oaths in all civil and criminal cases of minor importance in the first instance, if our most experienced judicial officers, including the court of Sudder Dewanny Adawlut entertained the same opinion."

(*g*) See Wille's Rep. 538.

was judged advisable to trample the law under foot. A judicial *caveat*, however, was at the same time entered against giving the same credit, either "by court or jury, to an infidel witness as to a Christian."

Provided only the wrath of God be imprecated, it mattered little to the common law, the wrath of what God was imprecated, whether Vishnu or Fo, or any other of the innumerable Gods of heathenism. But in none of them does the Christian repose faith. The witness imprecating the vengeance of false Gods, of Gods who will not answer, what is the belief of the Christian? That the true God will as much hear and punish in consequence of the use of this ceremony, and for its violation, as if the adjuration had been in His name? If so, then are the magic virtues of the oath still more enhanced—being compulsory upon the Deity, even when his name is not invoked. If not, then why swear the witness in the name of false Gods? Why give a judicial sanction to superstition and idolatry, by invoking false Gods; why not rather let testimony be delivered under the pains and penalties of perjury, and let that suffice?

Yet by the common law, the swearer by broken cups and saucers, or he who thinks truth obligatory only as he has held the tail of the sacred cow when the oath was administered, was heard, while the intelligent and pious Quaker, who, in the simplicity of his heart, was so heretical as to believe that the command "Swear not at all" meant what its obvious language imports, was excluded, because he believed the divinity of the command he was anxious to obey. He was thus left without protection to his person or property, unless he should be able to find a witness without the pale of his sect, by whom his legal rights could be established.

By that patchwork legislation, so eminently distinguishing all law reform, an act was passed, and the law so amended that a Quaker, when property was endangered, was admitted to testify,—but in cases of property alone,—his testimony not being admissible in criminal cases. In this country, however, the legislature have removed the disqualification entirely; the absurdity is, that it should ever have existed.

These limited reforms do not afford a complete remedy for the evil. The incorrectness of religious belief is not the ground of exclusion—for if so, one would think Hindooism sufficiently erroneous for that purpose. The theological jurist views with more complacency the worst forms of Paganism than a questionable variety of Christianity or entire unbelief. The only required qualification in his view, is belief in a *future* punishment, of which, in every aspect, he must be unutterably ignorant. If, believing the general doctrines of Christianity, he is so unfortunate as to believe that the cares, and sorrows, and misfortunes of this life are a sufficient punishment for transgressions here committed, and that God, in His infinite goodness and mercy, will hereafter receive all into a state of happiness, the common law excludes his testimony.(*h*) The judicial

(*h*) The doctrine as now established in this country and in England, is, that if a person believes in a God, the avenger of falsehood, in a *future state of rewards and punishments*, he may be a witness and not otherwise." Per Daggett, J., in Atwood v. Welton, 7 Conn. 66. But authorities on this question clash. In Pennsylvania, it has been held that a belief in a *future* state of rewards and punishments is not essential to the competency of a witness. Nor is it a cause of exclusion that he does not believe in the inspired character of the Bible. The test

dabbler in theology in this country, has generally followed the lead of transatlantic jurisprudence.

But whether the Universalist be a witness or not, all authorities agree, that he who disbelieves in the existence of God, who, in the darkness of his beclouded reason, sees not God in the earth, teeming with its various and innumerable forms of animal or vegetable life, sees him not in the starry firmanent,—nor yet in the existence of man, the most wonderful of his works,—is excluded. Atheism is always rare, yet we have, three times in one county, known the attempt made to exclude for that cause. The general bad character of the witness for truth and veracity, affords no ground for exclusion, however much it may for disbelief in testimony; but even if it did, it would not have been established in those cases. Erroneous belief was the only reason urged. The error of such belief, or want of belief, may not merely be conceded—but the entertaining of such sentiments may be deemed the misfortune of his life. But because one of the securities for truth may be wanting, it is difficult to perceive why, all others remaining in full force and vigor, the witness should not be heard—and then after, not as the common law does, before such hearing, some judgment formed by those who are to decide upon the matter in dispute, of the truth or falsehood of his statements. He is rejected only because he is believed. If he is to be believed, when the truth uttered would expose him to reproach and ignominy, why not hear him under more favorable circumstances, when the rights of others may be involved, and then judge? Exclude him, and any outrage may be committed upon him—his property may be robbed—his wife may be violated—his child may be murdered before his eyes, and the guilty go unpunished, if he be the only witness; not because he cannot or will not tell the truth, but because the law will not hear him. Practically the law is, that provided a man's belief be erroneous, any body, whose belief is better, and it matters little what it be, Hindooism or Fetichism, may inflict any and all conceivable injuries on his person and property, and the law will permit such a criminal to go unpunished, unless there happens to be present some witness whose belief should square with the judicial idea of competency.

Let the witness testify under the pains and penalties of perjury, and the great argument for the wholesale exclusion of testimony by the law is done away with. No intelligent judge or juryman ever relied upon the security of an oath alone. Judge of the witness by his appearance, manner, answers, the probability of his statements, comparing them with the lights derivable from every source. Punish falsehood injuriously affecting the rights of others, in proportion to the wrong done, not with one uniform measure of punishment, as if the offence in all cases were the same. Tolerate not two kinds of truth, the greater and lesser, else both are lost. Elevate the standard of veracity, by requiring it on all occasions, and in this way public morality is increased, and the real securities upon which the social fabric rests are strengthened.

of competency is whether the witness believes in the existence of a God, who will punish him if he swear falsely; but whether the punishment will be *temporary* or *eternal*,—in this world or in that to come,—is immaterial on the question of competency. Blair v. Seaver, 2 Casey, 274. Butts v. Swartwood, 2 Cow. 431.

APPENDIX,

CONTAINING THE LEGISLATION OF THE DIFFERENT STATES IN RELATION TO THE LAW OF EVIDENCE.

THINKING it might not be without interest, a brief abstract of the statutes of the several States on this subject is added.

The common law may be taken as the existent law of evidence, except so far as the same may be modified by the statutory provisions of the several States. Those modifications it was no part of the object of this Treatise to discuss. But there will be found one class of exclusions, so enormous in its extent and so disastrous in its results, that it absolutely requires notice and consideration. I refer to the exclusions of the blacks and those of mixed descent, whether bond or free, and of Indians; by the former of which, in some of the States, the majority of the population are deprived of all right to testify as against the dominant race; by the latter of which, the original occupants of the soil are denied by the higher civilization, which has wrested from them their lands, even the right to bear witness in the courts of, and against those who now possess them.

The rightfulness of slavery—its patriarchal antiquity—its constitutionality—its christian graces, and its moral beauties may, by way of argument, be fully admitted; it may be conceded to be an institution alike beneficial to master and slave—sanctioned and approved by the laws of God and man—the first realization in practice of the golden rule—"that all things whatsoever ye would that men should do to you, do ye even so to them,"—still the enormity of the exclusion only thereby becomes more strikingly apparent.

In some of the States, according to the existing statutory law, in all cases between those of the dominant race, whether civil or criminal—between them and one of the degraded race,—whether relating to person or property,—where the now excluded testimony exists, and is the only attainable proof of the truth, the failure of justice is sure and unavoidable. By its admission, a chance for justice, greater or smaller, according to the reliability of the evidence, is obtained. Without it—it being the only evidence—the means of correct decision are unattainable.

While this remains the law, any and all conceivable wrongs and injuries may be inflicted by any one of the dominant upon any one of the servient blood—by the minority, it may be, upon the majority—and this

without fear of punishment, if those of the proscribed race only are present. Those of African or Indian descent are thus without the protection of the law, as against the whites.

The exclusion of witnesses, or absurd and illogical rules for the ascertainment of facts, are unmistakable proofs of deficient civilization. Barbarous nations resort to the ordeal or to lot. They shut out witnesses from some prejudice—because they are of a different religion or of different complexion. The principle is the same in each case. They judge of testimony by count, not by weight. As civilization advances, these rude methods of investigation, one by one, pass away. The ordeals, whether by fire or by water, like the oracles of the Pagan priesthood, vanish into thin air. The sacred lot loses its significance. Witnesses cease to be excluded. It is seen that the credit of witnesses can be more satisfactorily determined after than before a hearing. All are received as witnesses, and the various corroborating and discrediting circumstances are weighed and considered.

Why then exclude the black man—whether free or slave? Why exclude the Indian? Because of color? Certainly not. Because of deficient moral sense and probable falsehood? Is he generally false and mendacious? Granted; men do not lie without motive. It is a reason in each instance, for more carefully scrutinizing his statements—for guarding against too implicit credence. The common law receives the liar, however notorious he may be, and permits the credit of his statements to be impeached by the worthlessness of his character. The convicted perjurer is received in some of the States, and should be in all, subject to the deductions necessarily incident to his conviction.

Will it be false? No one can know in advance of its delivery. Will it be true, who would shut out the truth?

Is there reasonable ground of apprehension that this testimony, if false, would receive undue credit? Is not the danger rather that when it is true, it may not have its just weight? One of the grounds of exclusion is the fear, that being untrue, it will be acted upon as true. The existence of the present laws show how ill founded that fear. The argument runs thus:—The negro and the Indian are unworthy of credit—all know this—yet for fear all will believe them, we will not permit them to be heard. Hence, whole nations and races are branded in advance, as liars, by statute, and are not even heard.

Revised Statutes of Maine, 1857, *chap.* 82.—SECT. 77. No person shall be deemed an incompetent witness on account of his religious belief, but shall be subject to the test of credibility; and any person, who does not believe in the existence of a Supreme Being, shall be permitted to testify under solemn affirmation, and shall be subject to all the pains and penalties of perjury.

SECT. 78. No person shall be excused or excluded from being a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event thereof, as party or otherwise, except as is hereinafter provided, but such interest may be shown for the purpose of affecting his credibility.

SECT. 79. Parties shall not be witnesses in suits where the cause of action implies an offence against the criminal law on the part of the defendant, unless the defendant offers himself as a witness, and in that case the plaintiff may be a witness, and such defendant shall be held to waive his privilege of not testifying, where his testimony might criminate himself.

SECT. 80. Nothing in section seventy-eight shall in any manner affect the law relating to the attestation of the execution of last wills and testaments, or of any other instrument, which by law is required to be attested.

SECT. 81. Where a party to a suit resides without the State, or is absent from the State during the pendency of the suit, and the opposite party desires his testimony, a commission, under the rules of court, may issue to take his deposition; and such non-resident or absent party, upon such notice to him or his attorney of record in the suit, of the time and place appointed for the taking his deposition, as the court orders, shall appear and give his deposition. If he refuses, or unreasonably delays to do so, he may be non-suited or defaulted by order of court, unless his attorney will admit the affidavit of the party desiring his testimony, as to what the absent party would say, if present, to be used as testimony in the case.

SECT. 82. When one of the plaintiffs or defendants is used as a witness by the opposite party, testimony may be introduced by his co-plaintiffs or co-defendants to contradict or discredit him, as if he was not a party to the suit.

SECT. 83. The provisions of the five preceding sections shall not be applied to any cases, where, at the time of taking testimony, or at the time of trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator, or made a party as heir of a deceased party; but the deposition of a party may be used at the trial after his death if the opposite party is then alive; and in that case he may also testify.

SECT. 87. A person, to whom an oath is administered, shall hold up his hand, unless he believes that an oath administered in that form is not binding—and then it may be administered in a form believed by him to be binding. One not believing the christian religion may be sworn according to the ceremonies of his religion.

SECT. 88. Persons conscientiously scrupulous of taking an oath may make affirmation as follows: "I do affirm under the pains and penalties of perjury," which shall be deemed of the same force and effect as an oath.

SECT. 89. Persons convicted of an infamous crime, and sentenced in this State, are not competent witnesses, unless restored by a pardon; and a conviction out of the State, of such crime, may be given in evidence, to affect his credibility.

Acts of 1859, *chap.* 102.—*An Act in relation to the competency of witnesses.—Be it enacted by the Senate and House of Representatives in Legislature assembled,* as follows:—SECT. 1. In the trial of civil causes, the husband and wife of either party shall be deemed competent witnesses, when the wife is called to testify by or with the consent of her husband, and the husband by or with the consent of his wife.

Chapter 104.—*An Act relating to witnesses and evidence.—Be it enacted by the Senate and House of Representatives in Legislature assembled,* as follows:—No respondent in a criminal prosecution, or proceeding at law, for libel, nuisance, simple assault, simple assault and battery, or for the violation of any municipal or police ordinance, offering himself as a witness, shall be excluded from testifying, and all laws inconsistent herewith are repealed.

New Hampshire, 1853.—No person believing in a Supreme Being is incompetent on account of his opinions on matters of religion. * * * Members of corporations can be witnesses in cases affecting the interest of corporations.

Vermont, 1840.—Inhabitants of towns, &c., competent, where such town is party or interested, unless otherwise disqualified.

Massachusetts, 1860.—"No person shall be excluded by reason of crime or interest from giving evidence as a witness, either in person or by deposition, in any proceeding, civil or criminal, in court or before a person having authority to receive evidence. But the conviction of any crime may be shown, to affect the *credibility* of any person testifying.

"Parties in civil actions and proceedings, including probate and insolvency proceedings, suits in equity, and divorce suits, (except those in which divorce is sought on the ground of alleged criminal conduct of either party,) shall be admitted as competent witnesses for themselves or any other party; and in any such case in which the wife is a party, or one of the parties, she and her husband shall be competent witnesses for or against each other; but they shall not be allowed to testify as to private conversations with each other: *Provided,* That where one of the original parties to the contract or cause of action in issue and on trial, is dead, or is shown to the court to be insane; or when an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, except in the last named case, as to such acts and contracts as have been done or made since the probate of the will, or the appointment of the administrator."

Rhode Island, 1857.—Witnesses are not excluded by reason of incapacity from interest. Parties to civil suits may testify, and may be compelled to attend, as other witnesses: *Provided,* in suits where administrators and executors are parties, the other party may be called, but he cannot offer himself. Husband and wife are not compelled to testify for or against each other.

Connecticut, 1849.—Persons believing in a Supreme Being are not incompetent, because of religious opinions. (Chap. 10, § 140.) No person is disqualified by interest, as party or otherwise; or by reason of conviction of a crime; (the same may be shown to affect his credit.) Sec. 141. The adverse party may be compelled to testify, or one having an adverse interest. (See 4 Day, 51; 7 C. R. 66.)

New York, 1852.—Witnesses are not incompetent because of religious belief; nor excluded by reason of their interest in the event of the action. (This is not to apply to a party to the action; 7 Barb. 120; 2 San. 680, 732.) Persons convicted of perjury, or subornation of perjury, are excluded till the judgment is reversed. Persons sentenced upon a con-

viction of felony are incompetent. Conviction of other offences not to disqualify. Offenders in duelling competent, and may be compelled to testify; (but such testimony cannot be used against witnesses.) Imprisoned convicts are competent, respecting offences in prisons. Ministers and priests not to disclose confessions made under rules of their denomination. Physicians not to disclose information acquired in their professional capacity; (4 Paige, 460; 14 Wend. 637; 21 Wend. 79.) Members of corporations, not named in the record as a party, are competent to testify against the interest of such corporation. Creditors are competent witnesses to a will, and admitted to prove the same.

New Jersey, 1847.—Persons convicted of (enormous) crimes, and of larceny above six dollars, are not admitted as witnesses, unless pardoned. Persons convicted of perjury, or subornation of perjury, not admitted, even if pardoned. In action brought against collectors, sheriffs, &c., for money not paid over, inhabitants may testify, "notwithstanding their liability to taxation, or being interested." The person whose name is forged is competent, on the trial of an indictment for the forgery.

Pennsylvania, 1857.—Inhabitants of school districts are competent, when the school district, or an officer thereof, is party: also, *generally*, persons are competent, even if the result may increase taxes or diminish the same. The prosecutor on indictment is competent, and the owner of stolen goods, &c.

Maryland, 1840.—No prisoner convicted or attainted of perjury, or subornation of perjury, is received as a witness, until the judgment is reversed. In criminal prosecutions, the testimony of slaves, &c., is received for or against slaves, &c.

North Carolina, 1837.—The testimony of colored persons is inadmissible against white persons; but it is admissible against each other.

Georgia, 1851.—Grand jurors are competent to give an account of evidence delivered before them as a body. No one is disqualified as a witness, by reason of any religious opinions such person may entertain or express; (yet his belief may go to the jury to affect his credit.)

No attorney is allowed to give testimony of any matter, either for or against his client, the knowledge of which he obtained by means of their relationship.

The prosecutor may be a witness. Convicts are competent, on trials for the escape or mutiny of fellow prisoners; (infamy of character or crime, shall be exceptions to their credit only.) Legatees are competent witnesses to a will, but the legacies are void. Creditors allowed to testify in proof of will, and their interest only affects their credit.

Alabama, 1852.—SECT. 2302. No objection must be allowed to the competency of a witness, * * * because he has been rendered infamous by a conviction for any crime, (except perjury, or subornation of perjury,) or because he is interested in the event of the suit, or liable for costs, unless the verdict and judgment would be evidence for him in another suit; but such objection goes only to his credit.

SECT. 2276. *Negroes, mulattoes, Indians,* and *all persons of mixed blood, descended from negro or Indian ancestors, to the third generation included, though one ancestor of each generation may have been a white*

person, whether bond or free, cannot be a witness in any cause, civil or criminal, except for or against each other.

Arkansas, 1858.—Constitution, article 7, sect. 3. No person who denies the being of a God, shall hold any office in the civil department of this State, nor be allowed his oath in any court.

No minister or priest is permitted to testify as to confessions made to him, in accordance with the rules of his denomination.

Physicians and surgeons are not to testify as to disclosures of patients. (Sect. 22, chap. 181, Revised Stats.)

No attorney or counsellor at law shall be required or allowed to testify in relation to facts communicated to him by his client, in his professional character. (Revised Stats., chap. 181, sect. 23.)

All persons believing the existence of a God, may be sworn, if otherwise competent. (Revised Stats., chap. 120, sect. 6.) SECT. 7. And he cannot be required to declare his belief or unbelief; but the same may be proved by other competent testimony.

The mother is competent in case of bastardy, (except otherwise incompetent.)

Persons engaged in duelling are competent witnesses against others.

The printer or publisher, in case of libel, is competent against the writer of the publication; (but such testimony cannot be received against such witness on his trial.)

The witness in any cause must answer, though such answer will subject him to a civil suit.

Negroes and mulattoes are only competent as witnesses in cases where negroes or mulattoes are parties.

Persons detained in prison may be brought out to testify, on writ of habeas corpus, except where such persons may be imprisoned under a sentence which renders him incompetent to testify in any case. (But *quære*, what crimes make him incompetent?)

Texas, 1850.—Inhabitants of a county are not incompetent, when county is a party.

Kentucky, 1852.—The mother of the child and the party accused, may be witnesses in bastardy cases, if otherwise competent.

Persons killing ravenous, mischievous dogs, going at large, may be competent witnesses to make out their justification for doing so.

A witness in a prosecution for gaming is not excused from testifying on the ground of criminating himself; yet he is discharged from liability therefor.

Slaves, negroes, and Indians, are not competent, except where they are parties, or the State may be. Indians, however, speaking the English language, and understanding an oath, are competent. No person is incompetent because liable to be assessed for levies for counties, towns, &c. No person incompetent because liable for costs, in common with others assessed for levies.

"In suits at law, either party, at the instance of his adversary, may be compelled to give evidence upon the trial."

A fiduciary may be a witness when he has no personal interest from being a party to the case, or being liable for costs.

No person convicted of felony is competent, unless pardoned; nor is

one convicted of perjury, or subornation of perjury, competent, even if pardoned.

Wisconsin, 1858.—Inhabitants of a county competent, when the county is interested.

The mother of a bastard child is competent, unless otherwise incompetent.

Members of corporations are competent, where the corporation is interested.

No person is disqualified by reason of his interest in the event of the suit, as party or otherwise, (excepting in certain suits of administrators, assignees, &c.,) but their interest may go to affect their credit.

Notice must be given that the opposite party is to testify.

Party to an action may be compelled to testify by the adverse party.

Party thus testifying may testify in his own behalf; if he testify to new matter, not responsive to the questions of the adverse party, the adverse party may be a witness respecting such matters.

"No person shall be deemed an incompetent witness by reason of having committed any crime, unless he has been convicted thereof."

Physicians cannot be compelled to disclose information acquired in their professional character.

Witness not excused because his testimony will show him liable for a certain debt.

Illinois, 1856.—In criminal cases, the party injured may testify, unless rendered incompetent by infamy, or otherwise than by interest; yet his credibility is left to the jury.

No black or mulatto person shall be a witness against any white person whatsoever.

Indiana, 1852.—Persons are not incapacitated by reason of crime or interest. But this shall not render competent a party to an action, or the person for whose use it is brought, or the husband or wife of any such party.

Children under ten years of age pronounced to be incompetent; if over ten, pronounced to be competent. Persons of unsound mind at the time of being produced are incompetent; but the court may examine persons of tender age and of alleged unsound mind, and decide upon their competency.

Husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication made from one to the other during the existence of the marriage relation, whether called as a witness while the relation exists, or afterwards.

No attorney, physician, surgeon, clergyman, or priest, shall be allowed, in giving testimony, to disclose any communication entrusted to him in his professional capacity, and necessary to the discharge of his duties, except with the consent of the party.

No want of belief in a Supreme Being, or in the christian religion, shall render a witness incompetent; but the want of such religious belief may be shown on the trial; and in all questions affecting the credibility of a witness, his general moral character may be given in evidence.

The party to an action may be examined at the instance of the adverse party.

Ohio, 1854.—No person shall be disqualified as a witness, in any case, action, or proceeding, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown to affect his credibility.

Any party may compel the adverse party to testify.

No party shall testify where the adverse party is executor or administrator of any person, when the facts to be proved occurred before the death of such person; nor shall he testify, unless he gives notice of such intention to the adverse party, his agent or attorney.

The following are incompetent:—persons of unsound mind; children under ten, who appear incapable of receiving facts and relating them truly; husband and wife, for or against each other; attorneys, in their professional capacity, except with their client's consent; clergymen and priests, without such consent.

California, 1853.—No person is excluded by reason of his interest, or on account of opinions on matters of religious belief; but this shall not apply to parties to an action, nor to the person for whose immediate benefit a suit exists. A party to a suit may be examined, at the instance of an adverse party, and his examination rebutted by adverse testimony. A party examined by the adverse party, may be examined on his own behalf, in respect to matter pertinent to the issue; but if he testify to new matter, such adverse party may offer himself as a witness in his own behalf, relating to such new matter.

A party may be examined on the part of his co-plaintiff or a co-defendant.

The following *cannot* be witnesses:—persons of unsound mind; children under ten, who appear incapable of understanding facts and relating them; Indians, against white parties; negroes, against white persons; husband and wife, for or against each other, (this does not apply to an action by one against the other;) attorneys, without consent of the client; physicians, without the consent of the patient; priests and clergymen, without the consent of those confessing.

A judge or juror may be called as a witness by either party.

New York.—Code of Procedure, 1848.—*Chap.* 6.—SECT. 344.—A party to an action may be examined as a witness at the instance of the adverse party, or any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission.

SECT. 345. The examination, instead of being had as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days; unless, for good cause shown, the judge order otherwise.

But the party to be examined, shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

SECT. 346. The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed in like manner, and may be read by either party on the trial.

SECT. 347. If a party refuse to attend and testify, as in the last three sections provided, besides being punished himself as for a contempt, his complaint, answer, or reply, may be rejected.

SECT. 348. The examination of the party, may be rebutted by adverse testimony.

SECT. 349. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf in respect to the new matter, and shall be so received.

SECT. 350.—A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

Chapter 7.—SECT. 351. No person offered as a witness shall be excluded, by reason of his interest in the event of the action.

SECT. 352. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action, assigned for the purpose of making him a witness.

SECT. 353. No person residing more than one hundred miles from the place of examination, shall be obliged to attend as a witness before any court or judge, except as provided in section 355.

SECT. 354. Whenever either party desires the examination of a witness, who shall reside more than one hundred miles from the place where the trial or hearing is to be had, he may apply to a judge of the court for an order to examine such witness. Whereupon the judge, on due proof, to his satisfaction, of the materiality of the witness, may make an order for his examination, at a specified time and place, before the county judge of the county where the examination is to be had, or before a justice of the peace or referee residing therein, to be designated by the judge making the order.

SECT. 355. A copy of such order shall be forthwith served on the adverse party, and notice of the time and place of examination given according to the provisions of section 374.

The examination may thereupon be taken by such county judge, justice of the peace, or referee; and being certified by him to have been written and subscribed in his presence, and sworn to before him, and being filed with the clerk, may be read by either party on any trial or proceeding in the action, if the witness be dead, or do not reside within one hundred miles of the place of trial, or be unable to attend. But the court may, on special application, order either party to produce his witnesses, and any such witness to attend in open court, though residing more than one hundred miles from the place of trial; and after such order is made, the written deposition of any witness so ordered to be produced shall not be read.

SECT. 356. If any witness served with such order, or an order for his examination out of court, disobey it, he may be punished by the court or judge as for a contempt, and shall be liable to all the penalties to

which a witness is liable, who is duly served with process for his attendance at court, and neglects to attend.

Laws of New York, 1859.—*Passed April* 16, 1859.—SECT. 9.—Section three hundred and ninety-nine of the Code of Procedure, as heretofore amended, is hereby amended so as to read as follows:

SECT. 399. A party to an action or proceeding may be examined as a witness in his own behalf the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person. And when in any action or proceeding the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.

When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for; but such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee, or an executor, or administrator, unless the other party to such contract or thing in action whom the defendant or plaintiff represents is living, and his testimony can be procured for such examination, nor unless at least ten days' notice of such intended examination of the assignor shall be given in writing to the adverse party.

It will thus be perceived, that by the common law and the statutory enactments of some of the several States, persons of defective religious belief, those who are infamous by reason of conviction, the parties to a suit and those interested in its event, husband and wife, persons of unsound mind, children under the age of ten years, negroes, mulattoes, Indians and all persons of mixed blood descended from negro or Indian ancestors to the third generation, though one ancestor of each generation may have been a white person, whether *bond or free*, cannot be witnesses. Neither shall an attorney, physician, surgeon, clergyman or priest, be permitted to disclose any communications entrusted to them professionally, except with the consent of the party so entrusting, while of those admitted to testify no question can be asked, the answer to which would in the opinion of the witness tend to expose him to penalty, forfeiture or punishment, or perhaps even to disgrace.

The aggregate of these exclusions, compare in extent and vie in absurdity with the capricious laws of the Siamese. (Ante, p. 20.)

NOTE.—The above is a brief abstract of the legislation of several of the States as to the admission of proof. There may be inaccuracies. But whether literally exact or not, it sufficiently indicates the variations from the common law, and shows the necessity of further reform.

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